

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

Autumn Term, 1901

No. 741.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK
APPELLANT.

vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN
BANKRUPTCY OF EARL H. PRINCE, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

FILED AUGUST 1, 1902

(33,519)

(23,316)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 741.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK,
APPELLANT,

vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN
BANKRUPTCY OF EARL H. PRINCE, BANKRUPT.

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1911.

No. 1894

CONTINENTAL & COMMERCIAL TRUST & SAVINGS
BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN BANK-
RUPTCY OF EARL H. PRINCE,

Appellee.

MR. HORACE KENT TENNEY,
MR. CHARLES F. HARDING,
MR. ROGER SHERMAN,
MR. GEORGE T. ROGERS,
MR. HARRY A. PARKIN,

Counsel for Appellant.

MR. WILLIAM J. PRINGLE,
MR. EDWIN TERWILLIGER, JR.,

Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of
Illinois, Eastern Division.



1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held in the United States Court Rooms in the City of Chicago, in the Division and District aforesaid, on the third Monday of December (it being the eighteenth day thereof) in the year of our Lord One thousand Nine hundred and Eleven and of the Independence of the United States of America the 136th year.

Present the Honorable Kenesaw M. Landis and the Honorable George A. Carpenter, Judges of said court, presiding. Luman T. Hoy, United States Marshal for the said District and T. C. MacMillan, Clerk of said Court.

Chicago Title & Trust Company,	}
Trustee in bankruptcy of Earl H.	
Prince, Bankrupt,	
<i>vs.</i>	
Federal Trust & Savings Bank, <i>et al.</i>	

Be it remembered that heretofore, to wit, on the 16th day of March, A. D. 1906, there was filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, a Bill of Complaint, in the above entitled cause, said Bill of Complaint being in the words and figures following, to wit:

2 IN THE DISTRICT COURT OF THE UNITED STATES,
 Northern District of Illinois,
 Eastern Division.

To the Honorable Judges of said Court:

The Chicago Title & Trust Company, trustee in Bankruptcy of Earl H. Prince, bankrupt, of the City of Chicago, in the State of Illinois, a citizen of the State of Illinois, complainant, brings this its bill of complaint, against the Federal Trust & Savings Bank and W. P. Anderson & Company, corporation, of the same place, and citizens of the State of Illinois, defendants, and thereupon your orator complains and says that:

I.

On to wit, the 15th day of February, 1905, there was filed in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, by William H. Francisco, John Erickson, A. H. Wilson, and A. K. Thomas, creditors of Earl H. Prince, a petition to have said Earl H. Prince adjudged a bankrupt within the purview of the Acts of Congress in relation to Bankruptcy, and afterwards, to wit, on the 30th day of March A. D. 1905, such proceedings were had in said court on said petition that the said Earl H. Prince was adjudged to be a bankrupt, and afterwards, to wit, on the 18th day of May A. D. 1905, at a meeting of creditors of said Earl H. Prince your orator was elected by the creditors of said Earl H. Prince as trustee in bank-

ruptcy of said Earl H. Prince and thereupon appointed as such a trustee by the Honorable Frank L. Wean, Referee in Bankruptcy of said court and qualified as such by filing its bond in said court, which bond was approved and your orator is still acting as trustee of said bankrupt.

II.

On, to wit, the 10th day of January A. D. 1906, an order was entered by the said Frank L. Wean, Referee, authorizing your orator to file this, its bill of complaint, against the above named defendants.

III.

At the time of the filing of said petition in bankruptcy and for several years prior thereto, the said Earl H. Prince was a member of the Board of Trade of the City of Chicago, a corporation created by the laws of the State of Illinois, and was engaged in the business of buying and selling grain and other commodities on said Board of Trade, on time contracts and otherwise. And the defendant, W. P. Anderson & Company, through its officers, who were members of said Board of Trade, was also engaged in the business of buying and selling grain and other commodities on said Board of Trade, on time contracts and otherwise. And the defendant, Federal Trust & Savings Bank, was then and there engaged in the general banking business in said City of Chicago, and the bankrupt Earl H. Prince, was then and there transacting his banking business with said bank, and was on the 10th day of February A. D. 1905, and thereafter largely indebted to said bank on certain promissory notes in an amount exceeding the sum of Thirty Thousand (\$30,000.00) Dollars.

IV.

On, To wit, the 10th day of February, A. D. 1905, and at all times thereafter the said Earl H. Prince was insolvent as each of said defendants well knew or had reasonable cause to believe.

V.

At all times mentioned in this bill there was in force certain rules and by-laws of the said Board of Trade of the City of

Chicago, regulating the business transacted thereon by its members and among said rules and by-laws were the following, to wit,

Rule XXII, Section 6—In case it shall appear that delivery of any outstanding trade or contract between members of the Association may be offset by some other corresponding trade or contract, made by the parties with other members of the Association, and the parties to such trade or contract, or their authorized agents, consent to such offset, such trade or contract shall be deemed to have been settled, and any balance between the current market value of the property covered by such trade or contract, and the several contract prices shall be due and payable immediately by the party from whom such balance may be due to the party entitled to receive the same under his contract. The current market value of the property contracted for shall be conspicuously posted at a stated hour each day, under the direction of the Board of Directors, in the Exchange hall and in the settlement room of the Board, which posting shall serve as a basis for the adjustment of all contracts settled, as herein provided, on that day.

In order to facilitate the operation of this section, each member is required to keep a settlement book in which shall be entered the names of parties with whom settlements have been made, and the dates and terms of the trades included in such settlements, and the prices at which the commodities
5 were originally sold or purchased, and the amounts due to or from him or them on each separate settlement, also the net amount due to or from him or them on all settlements; and the Board of Directors is hereby authorized to provide a suitable office, with the necessary employees, to which members shall be required, at stated hours each day, to make reports, showing the net balance due to or from each member, as shown by such settlement book, and also the general balance due to or from him or them upon all such settlements; each report to be accompanied with an acceptable check for the aggregate of balances, if any, due from him or them on the contracts so settled; whereupon, if said report is found to be correct, as compared with other reports rendered him, the person in charge of said office shall at a stated hour each day, pay to each of the parties making such reports any balances which he may have collected, and which shall appear to be due to them by said reports, less such charges as

FII

Rule XX, Section I.—On time contracts, purchasers shall have the right to require of sellers, as security, a deposit of ten (10) per cent, based upon the contract price of the property bought, and further security from time to time, to the extent of any advance in the market value above said price. Sellers shall have the right to require as security from buyers a deposit of ten (10) per cent, on the contract price of the property sold, and, in addition, any difference that may exist or occur between the estimated legitimate value of any such property and the price of sale. All securities shall be deposited, either with the Treasurer of the Association or with some bank duly authorized by the Board of Directors to receive such deposits; and shall, in each instance, be accompanied by the following form of memorandum or statement:

For depositor and : Amount

Have deposited approved
check for Margin Certificate
which we will issue today in
accordance with your rules
as follows:

6 The above form of memorandum shall state the name of the depository, the date on which the deposit is made, the name of the depositor, and also the name or names of the party or parties in whose favor the deposit is to be made, together with the amount or amounts of such deposit in detail, and also in the aggregate. The left hand part of the memorandum or statement before described shall be retained by the depository selected, and the right hand portion thereof taken by the de-

positor, after being duly signed by the person authorized to receipt for the said deposit, and, without delay, placed in the office of the Clearing House of the Board of Trade of the City of Chicago; it being distinctly understood that the provisions of section 2 of this Rule are and shall remain in force, and that the issuance of the certificate in the form and manner prescribed in said Section 2, is unaffected by the provisions of this section. It is hereby provided that such deposits shall not be made with any bank or banks to which the party calling for the said security shall expressly object at the time of making such "call"; but in such case the deposit shall be made with some duly authorized bank not thus objected to, or with the Treasurer of the Association, as the depositor shall elect.

Section 2—All banks which may be appointed to act as depositories for securities, shall be required to have one or more of their executive officers, members of this Board, who shall be held amenable to the Rules of said Board in matters of dispute arising from any transactions on the Board of Trade of the City of Chicago, between the banks they represent and any of the members of the said Board of Trade, and shall execute and file with the Secretary of the Association a good and sufficient bond, with sureties, to be approved by the Board of Directors, for the proper disposal of the said deposits, in accordance with the provisions of the Rules, Regulations and By-Laws of the Association. Said banks shall issue certificates in duplicate, not transferable, for all such deposits. Said certificates shall state by whom the deposit was made, and for whose security the same is held, that the deposit has been made under the rules of the Board of Trade and is payable upon the return of the certificate or its duplicate, duly indorsed by the parties to the contract or contracts, or on the order of the President of the Board of Trade, as provided by Section 6 of this rule. Said certificate shall be in the following form, to wit:

Original (or) Duplicate.

Not Negotiable or Transferable.

Chicago 18.....

..... has deposited with this bank Dollars as security on a contract or contracts between the depositor and which amount is payable on return of this certificate or its duplicate duly endorsed by both of the above named parties, or on the order of the President of the Board of Trade of the City of Chicago, indorsed on either the original or duplicate hereof,

7 as provided by the Rules of said Board of Trade, under which the above-named deposit has been made. F1

.....
Cashier.

All deposits so made shall be held to have been made as security for the faithful fulfillment of any contracts made or to be made between the parties during the time of the deposit shall remain unpaid; provided, it shall be competent for either party to a contract to demand that the certificate shall express the particular contract upon which the deposit shall have been made, and in such case the deposit shall be applicable only to the settlement of that contract.

VI.

On, to wit, the 14th day of February, 1905, the said Earle H. Prince had a large number of said time contracts with other members of said Board of Trade for the purchase and sale of grain and other commodities at various prices. At the market price of said grain and other commodities, fixed by the Board of Trade in accordance with its rules, a large number of said time contracts had profits of great value to the said bankrupt, the amount of which is unknown to your orator, but which aggregated many thousand dollars, and others of said contracts were liabilities on said contracts of said bankrupt to other members of said Board of Trade, but said liabilities were less than the profits on said other contracts. Many of the members of said Board of Trade with whom said bankrupt had such time contracts held securities for the same furnished by the said bankrupt for the fulfillment of said contracts in accordance with said rule of said Board of Trade and which said securities were commonly known as margins. The said defendant bank was then and there acting as one of the depositories for such securities under said rules. The said securities consisted of sums of money put up in escrow or trust with the said bank by the said bankrupt for the security of the members of said Board of Trade named in the certificates issued by said bank as evidence of such security in accordance with said rules. The said sums of money so put up in escrow or trust as security were in no sense debts of said bank to said bankrupt and were in no way subject to his control, but were held by said bank solely as security as aforesaid for persons named in said certificates.

The number and amount of said certificates and the names of the parties secured by the same are unknown to your orator but are well known to the defendants and your orator prays discovery thereof.

VII.

On, to wit, the 14th day of February, A. D. 1905, the said defendants and Earl H. Prince, confederating and conspiring together for the purpose of hindering and delaying and defrauding some of the creditors of Earl H. Prince, and enabling some of his creditors to obtain a greater percentage of their debts than other creditors of the same class, and particularly for the purpose of paying the debts due from the bankrupt to the members of the Board of Trade, who held the securities aforesaid, and thereby releasing or withdrawing from escrow or trust the money held by the defendant bank, and thereafter applying said moneys upon the indebtedness of said bankrupt to said bank, thereby enabling it to obtain a greater percentage of its debts than other creditors of the said bankrupt of the same class, agreed that the said Earl H. Prince should transfer to the defendant, W. P. Anderson & Company, and thereupon the said Earl H. Prince did so transfer to said W. P. Anderson Company, all his time contracts or open trades with the members of said Board of Trade, without any consideration whatsoever. And thereupon the said W. P. Anderson & Company settled all of said time contracts or open trades of Earl H. Prince with other members of said Board of Trade and collected from said members the amounts due said bankrupt upon said time contracts as settled according to the market price in accordance with the rules of said Board of Trade, and out of the moneys so collected by it paid to other members of the Board of Trade amounts due to them from said bankrupt on said contracts, and paid to the members of the said Board of Trade holding the securities aforesaid, the amounts due them, and thereupon received from them the certificates for such securities duly indorsed by them and delivered the said certificates to defendant bank, who withdrew the sums represented by said certificates from the escrow or trust under which they were held by the bank and applied said sums of money upon the indebtedness of said bankrupt to said bank. The names of the members of the Board of Trade with whom said bankrupt has said time contracts, the terms of said

contracts, the purchase and selling price of the same and the settling price are unknown to your orator, but are well known to the defendant, W. P. Anderson & Company, and your orator prays discovery of the same. FII
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VIII.

At all times on and after the 10th day of February A. D. 1905, there were other creditors of the said bankrupt of the same class with the defendant bank and the members of the said Board of Trade and the effect of enforcing the said transfer of the said time contracts to the defendant, W. P.

Anderson & Company, and the payment by it of the 10 amount due to the members of the said Board of Trade from said bankrupt, and the withdrawing of the said sum deposited as security and applying the same upon the indebtedness of the same bank was to enable the said members of said Board of Trade and the said bank to obtain a greater percentage of their debts than other creditors of the said bankrupt of the same class; and at the time of the said transfer the said bank and the said members of said Board of Trade had reasonable cause to believe that preferences were thereby intended.

IX.

The amount due to creditors of said bankrupt exceeds the sum of One Hundred Thousand (\$100,000.00) Dollars and claims in excess of Twenty Five Thousand (\$25,000.00) Dollars have been filed and allowed by Frank L. Wean, Referee in Bankruptcy. The assets of said bankrupt are less than Ten Thousand (\$10,000.00) Dollars in value and amount, exclusive of the value of the property of said bankrupt transferred as aforesaid.

X.

Wherefore, the said transfer of the said time contracts ought to be considered as having been made in fraud of the rights of your orator, representing the creditors of said bankrupt; and the defendant, W. P. Anderson & Company ought to be held to be a trustee for your orator as aforesaid in settling said time contracts and collecting and disbursing the proceeds of the same and to account to your orator therefor and to discover the beneficiaries thereof; and the credit-

ors of said bankrupt to whom the proceeds of said transfer were paid and who thereby received preferences within 11 the meaning of the Acts of Congress in relation to Bankruptcy, ought to be held to account therefor to your orator an dto pay the same to your orator, and your orator ought to be subrogated to all the rights and benefits of those members of said Board of Trade, who held the securities aforesaid, and the defendant bank ought to be held to repay the sums of money represented by such securities to your orator.

XI.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief here prayed and may according to the best and utmost of their respective knowledge, remembrance and belief, make full, true, direct and perfect answer, but not under oath, answer under oath being hereby waived, to this bill and to such interrogatories hereinafter numbered and set forth as by note hereunder written, they are respectively required to answer, that is to say:

1. How much was due and owing from Earl H. Prince to the Federal Trust & Savings Bank on February 14th, 1905?

2. What was the earliest date on which the Federal Trust & Savings Bank or any of its officers or agents had knowledge that said Earl H. Prince was insolvent or had reasonable cause to believe that he was insolvent?

3. What was the earliest date on which W. P. Anderson & Company or any of its officers or agents had knowledge that said Earl H. Prince was insolvent or had reasonable cause to believe he was insolvent?

4. Give a list of all the time contracts or open trades transferred by Earl H. Prince to W. P. Anderson & Company, 12 showing the members of the Board of Trade with whom said contracts were had, the amount of grain or other commodity included in each of said contracts, the contract prices thereof and prices at which said contracts were settled by said W. P. Anderson & Company.

5. What amounts were received by W. P. Anderson & Company in settlement of said time contracts and from whom?

6. What amounts were paid upon settlements of said time contracts and to whom?

7. On what date were said time contracts transferred to said W. P. Anderson & Company by Earl H. Prince?

8. Name the members of the Board of Trade who on February 14th 1905, held securities or margins furnished under the rules of said Board of Trade by Earl H. Prince and the respective amounts thereof?

9. What certificates were delivered by Earl H. Prince to W. P. Anderson & Company?

10. On what date were said securities or margins applied by the Federal Trust & Savings Bank upon the indebtedness of Earl H. Prince?

And Your Orator Prays As Follows:—

1. That the said transfer of said time contracts be decreed to be a fraud upon your orator.

2. That the defendant, W. P. Anderson & Company, be decreed to have received said transfer and the proceeds thereof and to have disposed of the same as trustee for your orator and that an account may be taken by and under the direction of this Honorable Court of the amounts received and

13 paid out by said W. P. Anderson & Company on the settlement of said time contracts and that the said W. P. Anderson & Company discover to your orator all the creditors of said bankrupt to whom the proceeds were paid and the respective amounts thereof.

3. That your orator may be decreed to be subrogated to all the rights and benefits of those members of the said Board of Trade who held the securities on margins hereinbefore mentioned as against the defendant, Federal Trust & Savings Bank and that said defendant bank be decreed to repay the same to your orator.

4. That the application of said securities or margins upon the debt of said bankrupt be decreed to be a preference within the meaning of the Act of Congress in relation to Bankruptcy.

5. That your orator have leave to make additional parties defendant to this bill, if necessary, as the same shall be discovered.

6. For full and complete discovery as hereinbefore prayed.

7. For all other proper relief.

May it please your Honors to grant the writ of summons in chancery directed to the United States Marshall for this District, commanding that he summon the said defendants to appear before said court on the first Monday of April, 1906,

Bill of Complaint.

at a term of court to be held at the courthouse in Chicago in said District then and there to answer this bill, etc.

CHICAGO TITLE & TRUST CO.,
Trustee Estate of Earl H. Prince, Bankrupt.
 By WM C. NIBLACK,
Vice President.

WM. J. PRINGLE &
 EDWIN TERWILLIGER, JR.,
Solicitors for Complainant.

14 State of Illinois }
 County of Cook } ss.

Wm. C. Niblack, being first duly sworn on oath says that he is Vice President of the Chicago Title & Trust Company; that he has read the foregoing bill of complaint and that the same is true, except as to matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

WM. C. NIBLACK.

Subscribed and sworn to before me this 16th day of March A. D. 1906.

HENRY J. TANSLEY
 (Seal) *Notary Public.*

Note

The defendant, Federal Trust & Savings Bank is requested to answer the interrogatories numbered respectively 1, 2, 3, 7, 8, 9, and 10.

The defendant, W. P. Anderson & Company is requested to answer the interrogatories numbered respectively 2, 3, 4, 5, 6, 7, 8 and 9.

Endorsed:—9743. In the U. S. District Court. Northern District of Illinois. Eastern Division. Chicago Title & Trust Company, trustee in bankruptcy of Earl H. Prince, Bankrupt. vs. Federal Trust & Savings Bank, et al. Bill of Complaint. Filed Mar 16, 1906 at o'clock T. C. MacMillan Clerk. M. William J. Pringle and Edwin Terwilliger, Jr, Attorneys.

15 And afterwards, to wit, on the 16th day of March, A. D. 1906, there was issued out of and under the seal of said Court, in the above entitled cause, a Subpoena; same being in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss.
Northern Division.

Fi

The United States of America.

To Federal Trust and Savings Bank and W. P. Anderson & Company, Corporations, Greeting:

We Command you and every of you that you appear before our Judges of our District Court of the United States of America, for the Northern District of Illinois, at Chicago, in the Northern Division of said District, on the first Monday in the month of April next to answer the Bill of Complaint of Chicago Title & Trust Company Trustee of Earl H. Prince, Bankrupt, this day filed in the Clerk's office of said Court in said City of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon paid of judgment being pronounced against you by default.

To the Marshal of the Northern District of Illinois to Execute

Witness the Honorable S. H. Bethea, Judge of the District Court of the United States of America, for the Northern District of Illinois, at Chicago aforesaid, this 16th day of March, in the year of our Lord Nineteen hundred and six and of our independence the 130th year.

T. C. MacMILLAN,
Clerk.

(Seal)

MEMORANDUM

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The above named defendants are notified that unless they and each of them shall enter their appearance in the Clerk's office of said Court, at Chicago, aforesaid, on or before the day to which the above writ is returnable, the Complainant's Bill will be taken against them as confessed, and a decree entered accordingly.

T. C. MacMILLAN,
Clerk.

16 I served this writ in my District in the following manner towit: Upon the within named Federal Trust and Savings Bank by reading the same to and within the presence and hearing of Frank Scheidenhelm, Cashier, of said bank

Ma
r

and at the same time delivering to him personally a true copy thereof on the 17th day of March A. D. 1906.

I was unable to find the President of said Bank within my District.

JOHN C. AMES,
U. S. Marshal.
By J. H. REID,
Deputy.

Marshal's Fees.

Service - 1-	2.00
Mile - 1-	.06
	<hr/>
	\$2.06

Upon the within named W. P. Anderson and Company by reading the same to and within presence and hearing of W. P. Anderson the President of said Company and at the same time delivering to him personally a true copy thereof on the 17th day of March A. D. 1906.

JOHN C. AMES,
U. S. Marshal.
By WALTER WAINRIGHT,
Deputy.

Marshal Fees

Service - 1 -	\$2.00
Miles - 1 -	.06
	<hr/>
	\$2.06

Endorsed: 9743. Chicago Title & Trust Co. etc. vs. Federal Trust & Savgs Bank et al. Subpoena. Filed March 20 1906/ T. C. MacMillan, Clerk.

17 And afterwards, to wit, on the 2nd day of April, A. D. 1906, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Appearance; same being in the words and figures following, to wit:

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division.

Chicago Title & Trust Co., Trustee,
etc.
vs.
Federal Trust & Savings Bank, *et al.* } 9743.

We hereby enter the appearance of the defendants, Federal Trust and Savings Bank and W. P. Anderson and Company, and of ourselves as their solicitors.

TENNEY, COFFEEN, HARDING and WILKERSON.

Dated Chicago March 31, 1906.

TENNEY, COFFEEN, HARDING and WILKERSON.

Solicitors for said defendants.

Endorsed:—9743. United States District Court, Chicago Title & Trust Co., Trustee, etc., vs. Federal Trust & Savings Bank, et al. Appearance. Filed Apr 2, 1906. at 9.30 oclock A. M. T. C. MacMillan Clerk. Tenney, Coffeen, Harding and Wilkerson, Chicago.

18 And afterwards, to wit, on the 2nd day of May, A. D. 1906, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Demurrer to Bill of Complaint; same being in the words and figures following, to wit:

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company, etc. }
vs.
 Federal Trust & Savings Bank, *et al.* }

The Demurrer of Federal Trust & Savings Bank to the Bill of Complaint of Chicago Title & Trust Company, Trustee Complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said Bill of Complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged demurs to said Bill and for causes of demurrer, shows that the complainant has not in and by its said Bill made or stated such a case as entitles it in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said Bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in the said Bill of Complaint this defendant demurs to the said Bill and to all the matters and things therein contained, and prays judgment of this Honorable Court whether it shall be compelled to make any further or other answer to the said Bill and it prays to be dismissed with its reasonable costs in this behalf sustained.

FEDERAL TRUST & SAVINGS BANK,
 By TENNEY, COFFEEN, HARDING & WILKERSON
Solicitors for said defendant.

I certify that in my opinion the foregoing demurrer of the Federal Trust & Savings Bank, defendant to the Bill of Complaint of the Chicago Title & Trust Company, Trustee complainant, is well founded in law and proper to be filed in the above cause.

United States of America }
Northern District of Illinois } ss.

F

F. J. Scheidenhelm, being first duly sworn on oath deposes and says, that he was the cashier of the defendant, Federal Trust & Savings Bank, herein and makes this affidavit in its behalf; that he has read the above and foregoing demurrer to the Bill of Complaint herein and that said demurrer is not interposed for the purpose of delaying said suit or any proceedings therein.

F. J. SCHEIDENHELM.

Subscribed and sworn to before me, this 30th day of April,
A. D. 1906.

(Seal) HARRY A. PARKIN,
Notary Public, Cook County, Illinois.

Endorsed: 9743 United States District Court Chicago
Title & Trust Co., etc. vs. Federal Trust & Savings Bank, et
al. Demurrer to Bill of Complaint. Filed May 2, 1906, T.
C. MacMillan, Clerk.

20 And afterwards, to wit, on the 2nd day of May, A. D. 1906, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Demurrer to Bill of Complaint; same being in the words and figures following, to wit:

F

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company, etc. }
vs. }
Federal Trust & Savings Bank, et al. }

The Demurrer of W. P. Anderson & Company, a Corporation to the Bill of Complaint of Chicago Title & Trust Company, Trustee Complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said Bill of Complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged demurs

to said Bill and for causes of demurrer, shows that the complainant has not in and by its said Bill made or stated such a case as entitles it in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said Bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in the said Bill of Complaint this defendant demurs to the said Bill and to all the matters and things therein contained, and prays judgment of this Honorable Court whether it shall be compelled to make any further or other answer to the said Bill and it prays to be dismissed with its reasonable costs in this behalf sustained.

W. P. ANDERSON & Co.

By TENNEY, COFFEEN, HARDING & WILKERSON

Solicitors for said defendant.

I certify that in my opinion the foregoing demurrer of W. P. Anderson & Company, a Corporation, defendant to the Bill of Complaint of the Chicago Title & Trust Company, Trustee complainant, is well founded in law and proper to be filed in the above cause.

21

HORACE KENT TENNEY,

Solicitor for said defendant.

United States of America }
Northern District of Illinois } ss.

Wm. P. Anderson, being first duly sworn on oath deposes and says, that he is President of the defendant, W. P. Anderson & Company, herein and makes this affidavit in its behalf; that he has read the above and foregoing demurrer to the Bill of Complaint herein and that said demurrer is not interposed for the purpose of delaying said suit or any proceedings therein.

WM. P. ANDERSON.

Subscribed and sworn to before me, this 1st day of May
A. D. 1906.

HARRY A. PARKIN,

(Seal)

Notary Public, Cook County, Illinois.

Endorsed: 9743 United States District Court Chicago
Title & Trust Co., etc. vs. Federal Trust & Savings Bank, et
al. Demurrer to Bill of Complaint. Filed May 2, 1906, T. C.
MacMillan, Clerk.

164 And afterwards, towit, on the 12th day of May A. D. 1906, the following order was had and entered of record in said cause, to-wit:

Chicago Title & Trust Co.,	}	No. 9743.
<i>vs.</i>		
Federal Trust and Savings Bank,		
<i>et al.</i>		

Come the parties by their Solicitors and on motion It is Ordered by the court that the demurrers of the defendants to the Bill be set down for hearing on May 23, 1906, at ten oclock A. M.

165 And afterwards, to wit, on the 16th day of June A. D. 1906, the following order was had and entered of record in said cause, towit:

Chicago Title and Trust Co, Trustee,	}	No. 9743.
<i>vs.</i>		
Federal Trust and Savings Bank,		
<i>et al.</i>		

This matter coming on to be heard on the separate demurrer of the defendants to the Bill herein come the parties by their Solicitors and after arguments of Counsel the court being fully advised in the premises overrules said demurrers and rules said defendants and each of them to answer within twenty days.

22 And afterwards, to wit, on the 25th day of September, A. D. 1906, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Separate Answer of Federal Trust & Savings Bank to Bill of Complaint; same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

Chicago Title & Trust Company,
Trustee in Bankruptcy of Earl H.
Prince,

vs.

Federal Trust and Savings Bank and
W. P. Anderson & Company.

The Separate Answer of the Defendant, The Federal Trust
and Savings Bank, to the Bill of Complaint Herein.

This defendant, reserving to itself all benefit and right of exception to said bill, and insisting that this court has no jurisdiction to entertain said bill, and that said bill does not show on its face any right to either discovery or relief as against this defendant concerning the matters in said bill set forth, by way of plea and answer to said bill, says:

1. As to the allegations of said bill with reference to the bankruptcy proceedings against said Prince, and with reference to the amount of his indebtedness and other matters connected with his financial affairs, this defendant, having no accurate knowledge thereof, leaves said complainant to
23 make such proof as it may be advised is necessary.

2. Further answering, this defendant denies that either on the 14th day of February, 1905, or at any other time this defendant either confederated or conspired with either Earl H. Prince or any one else for the purpose of hindering, delaying or defrauding any of the creditors of said Prince or of enabling any of said creditors to obtain a preference, or for the purpose of giving a preference to the creditors who were members of the Board of Trade, or for the purpose of releasing money or securities issued by this bank and applying the same to the indebtedness of said bankrupt to this bank, and thereby enabling it to obtain a preference over other creditors; and it denies that either for said purposes or for any other fraudulent or unlawful purpose it was agreed that said Prince should transfer to the defendant, W. P. Anderson

and Company, his open trades on the Board without consideration, or for the purpose of carrying out any such plan or scheme as is in said bill mentioned. It denies that it had at any of the times alleged in said bill any knowledge of the insolvency of said Prince or of any intent on his part to prefer this defendant or any other creditors, if, in fact, such intent actually existed, which this defendant in no wise admits.

3. Further answering, this defendant says, that the facts with reference to the transactions between it and said Prince in connection with said margin securities are as follows, and not otherwise: Said Prince had for several years prior to February 1905, had a deposit account with this defendant as his banker, and this defendant was also a creditor of said Prince upon his paper, which it discounted for him, the proceeds of said paper being passed to the credit of his deposit account against which he drew checks; and on February 14th said Prince was largely indebted to this defendant upon notes which it had so discounted for him. This defendant from time to time issued to said Prince certificates on the following dates and for the following amounts in connection with trades which he had with the following named persons whose names are stated in said certificates:

September	15,	1904,	\$300.00	Peavey Grain Co.
"	19	1904	300.00	Peavey Grain Co.
"	23	1904	250.00	Keith & Co
October	17	1904	250.00	Peavey Grain Co.,
January	10	1905	500.00	Pringle, Fitch & Rankin
"	20	1905	250.00	Peavey Grain Co.
"	31	1905	250.00	Finley Barrell & Co.
"	31	1905	250.00	Ware & Leland.
"	31	1905	250.00	Ware & Leland
February	6	1905	300.00	A. J. White & Co.
"	6	1905	250.00	Walter Comstock
"	6	1905	300.00	J. A. Edwards & Co.
"	7	1905	300.00	Crighton & Co.
"	9	1905	250.00	Pringle, Fitch & Rankin.
"	9	1905	250.00	C. H. Canby & Co.

Total amount \$4250.00

Each of said certificates, except as to the names, dates and amounts were in the following form:

Federal Trust and Savings Bank
Chicago,

No—

Deposited by E. H. Prince,\$

..... Dollars. As security on a contract or contracts between the depositor and, which amount is payable on the return of this certificate, or the duplicate of the same (one of which being paid, the other shall become void), duly endorsed by both of the above named parties, or on the order of the President of the Board of Trade of the City of Chicago, endorsed on either the original or duplicate hereof, as provided by the rules of the Board of Trade under which the above named deposit has been made.

Original

Not negotiable or transferable.

.....
Cashier.

25 That to procure said certificates said Prince drew his check against his checking account with this defendant or deposited with it as a general deposit the requisite sum of money. That no special deposit was made by said Prince in connection with any of said certificates or held by said bank, nor was any trust fund created or held by said Bank with reference to any of said certificates, but each of said certificates evidenced an indebtedness of this defendant to said Prince for the amount stated in said certificate, payable to him unless required to be paid to the other parties named therein because of a default by said Prince on the contract for which said certificate was held by the other party as security. That at all of these times said Prince was indebted to this defendant, so that except as this defendant might be liable thereon to the other party named in said certificate to the extent of that party's claim against said Prince upon the contract in connection with which said certificate was given, said certificate merely evidenced a debt from this defendant to said Prince, which was offset by his indebtedness to it as aforesaid.

4. Further answering, this defendant says that it is informed and believes it to be true that on or about February 14, 1905, said Prince transferred his outstanding trades on the Board to the defendant, W. P. Anderson & Company; that thereupon said Anderson & Company, in accordance with

the custom of the Board, assumed all of said trades, and was duly substituted in place of said Prince with the other parties thereto, and thereupon made its own arrangements with the other contracting parties with reference to securities and margins, and that thereupon said Prince, being relieved from

the obligation of said contracts, received back said certificates and delivered them to this defendant. That said

26 Prince was then indebted to this defendant in a sum far exceeding the amount of said certificates, and thereupon this defendant applied the amount due on said certificates upon the indebtedness which said Prince then and there owed to it, extinguishing said indebtedness to the amount of said certificates, but leaving a large amount which is still unpaid. And this defendant denies that the transaction aforesaid was either conceived or carried out for the purpose of giving a preference to this defendant or of defrauding other creditors, but was a lawful transaction involving the adjustment of mutual debits and credits between this defendant and said Prince in transactions which antedate his alleged insolvency, and which this defendant had a right to adjust in the manner above set forth. This defendant pleads these facts in bar of any right to discovery or relief on the part of said complainant.

5. This defendant further answering denies all fraud or fraudulent combination wherewith it is by said bill charged, and prays the same benefit from this answer as if it had pleaded or demurred to said bill, and having fully answered, prays to be hence discharged.

FEDERAL TRUST & SAVINGS BANK.

F. J. SCHEIDENHELM,

Cashier.

TENNEY, COFFEEN, HARDING & WILKERSON,

Solicitors for said Defendant.

27 Endorsed:—No. 9743. United States District Court.

Chicago Title and Trust Company, Trustee vs. Federal Trust & Savings Bank and W. P. Anderson & Company. Separate Answer of Federal Trust & Savings Bank to Bill of Complaint. Filed Sept. 25 -06. at 4 o'clock P. M. T. C. MacMillan clerk.

28 And afterwards, to wit, on the 25th day of September, A. D. 1906, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Separate Answer of W. P. Anderson & Company to Bill of Complaint; same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Chicago Title & Trust Company,	}
Trustee in Bankruptcy of Earl H.	
Prince,	
<i>vs.</i>	
Federal Trust & Savings Bank and	}
W. P. Anderson & Company.	

The Separate Answer of the Defendant, W. P. Anderson & Company, to the Bill of Complaint Herein.

This defendant, reserving to itself all benefit and right of exception to said bill, and insisting that this court has no jurisdiction to entertain said bill, and that said bill does not show on its face any right to either discovery or relief as against this defendant concerning the matters in said bill set forth, by way of plea and answer to said bill, says:

1. As to the allegations in said bill with reference to the bankruptcy proceedings against said Prince, and as to his indebtedness and other matters connected therewith, this defendant, having no personal knowledge thereof, leaves said complainant to make such proof as it may be advised is necessary.

2. Further answering, this defendant denies that
29 either on the 14th of February, 1905, or at any other time it confederated or conspired with either said Earl H. Prince or the other defendants for the purpose of hindering, delaying or defrauding any of the creditors of said Prince, or for the purpose of enabling any of them to obtain a preference, or for the purpose of paying debts due from him to the members of The Board of Trade, or of applying moneys ob-

tained from them to the indebtedness due the Federal Trust & Savings Bank for the purpose of allowing it to obtain a preference as in said bill charged, and denies that it either then or at any other time agreed either with said Prince or anyone else that he should transfer to it all of his time contracts or open trades on the Board without consideration, either for the purpose of accomplishing any such plan or any other fraud of any kind. This defendant further avers that if said Prince at any time entertained any such plan as in said bill set forth, this defendant was wholly ignorant thereof, and all of its acts and doings in connection with his affairs were without notice of any such plan.

3. Further answering, this defendant says, that the facts connected with its transactions with said Prince are as follows, and not otherwise: Said Prince, in accordance with the custom of the Board of Trade, on or about February 14th 1905, transferred his outstanding contracts to this defendant, and this defendant thereupon assumed all of said trades and agreed with the parties to whom the same were due to carry them out, and was thereupon substituted in said contracts in place of said Prince. That on such substitution being made, the securities or margins which said Prince had given in connection with said trade were released and returned, this defendant not collecting or receiving any money thereon.

30 And in place of said securities this defendant thereupon gave its own security, and thereupon said trades were carried through to their maturity or settled by this defendant as the contracting parties in place of said Prince. That this defendant is not now able to say what was done upon each of said trades because, in accordance with the custom on the Board, said trades were settled from time to time by being "rung up" with other trades which this defendant had with the same parties or with other members of the Board who had trades with said parties and with this defendant; so that said trades were settled, not as separate or individual matters, but as a part of the general business of this defendant with other members of the Board. This defendant denies that it received any money or property belonging to said Prince, either as trustee for him or his creditors or otherwise, or that it ever collected or received any money on account of said trades belonging to said Prince, or upon which he or any of his creditors had any claim whatever.

4. This defendant further avers that in all of its transac-

tions as above set forth, it acted in good faith without notice of any plan on the part of said Prince or anyone else to give a preference to any of his creditors, if any such plan existed, which this defendant denies. And this defendant further denies that said complainant is entitled to the relief in said bill prayed as against this defendant, or to any discovery or relief against it, and it pleads these facts in bar of the right of said complainant to any such discovery or relief against it, and prays the same benefit of this answer as if it had pleaded or demurred to said bill, and having fully answered, prays that it be hence discharged.

31

W. P. ANDERSON & Co.,
W. P. ANDERSON,

Pl.

TENNEY, COFFEEN, HARDING & WILKERSON,
Solicitors for said Defendant.

Endorsed: No. 9743. United States District Court, Chicago Title & Trust Company. Trustee, vs. Federal Trust & Savings Bank and W. P. Anderson & Company. Separate Answer of W. P. Anderson & Company to Bill of Complaint. Filed Sept. 25, 06. at 4 o'clock P. M. T. C. MacMillan, Clerk.

170 And afterwards, to wit, on the 26th day of January, A. D. 1911, the following order was had and entered of record in said cause, to wit:

Chicago Title and Trust Co., Trustee	} No. 9743.
<i>vs.</i>	
Federal Trust and Savings Bank	

Come the parties by their solicitors and on motion leave is given the complainant to file an amendment to its bill and the defendant is ruled to plead, answer or demur to same within five days.

32 And afterwards, to wit, on the 26th day of January, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Amendment to Bill; same being in the words and figures following, to wit:

33 IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division.

Chicago Title & Trust Co., Trustee
of Earl H. Prince, Bankrupt,
v
Federal Trust & Savings Bank, and
W. P. Anderson and Company } No. 9743

Amendment to the Bill of Complaint Filed by Leave of Court
First Had and Obtained.

Insert after paragraph eight on page nine of said bill, the
following, to-wit:

VIII A

On the tenth day of February, 1905, the said Prince had on deposit with the said bank in his deposit and checking account the sum of \$3,098.25, and on the said day the said bank appropriated out of the said balance the sum of \$3,095.00, and credited the same upon the indebtedness of said Prince to said bank, and charged said amount against said Prince's deposit and checking account. Thereafter on the same day, the said bank paid a check of said Prince's to the order of the Manager of the Board of Trade Clearing House, in the amount of \$656.25. and that on the close of business on February 10th, 1905, the said Prince thereupon became indebted to the said bank on an overdraft in the amount of \$653.00. Thereafter on the said February 10th, 1905, after the close of business on that date, the said Prince transferred to the said bank the
34 sum of \$1,450.00. On the eleventh day of February, 1905, the said bank paid Clearing House, payroll and salary checks drawn by said Prince against said checking account in the aggregate amount of \$1,073.10. On said February 11, 1905, said Prince transferred to said bank the sum of \$310.00; on February 14, 1905, the said bank paid Clearing House and salary checks drawn by said Prince against said account in the aggregate amount of \$777.05; and on the said fourteenth day of February, 1905, the said Prince transferred to the said bank \$1,319.00. The sums transferred by said Prince to said

bank on February 10th, 1911, and 14th, 1905, were entered by said bank as a credit on the deposit and checking account of said Prince on February 14, 1905. Thereupon there was a balance remaining to the credit of said Prince with said bank in the amount of \$575.79, which latter sum the said bank on said date appropriated and credited upon the indebtedness of said Prince to it, and charged said amount to his said account and closed said account. The said bank on and after February 10th, 1905, refused to pay other checks of said Prince, not payroll, salary or clearing house checks, previously drawn against said account by said Prince. The effect of said transfers of the said several sums of money by said Prince to said bank and the application of the same by said bank to the indebtedness of Prince to it was to enable the said bank to obtain a greater percentage of its debt than other creditors of said bankrupt of the same class. At the time of the transfers of the said several sums of money by said Prince to said bank, said bank had reasonable cause to believe that preferences were thereby intended.

CHICAGO TITLE & TRUST CO., TRUSTEE, ETC.,
Complainant.

By PRINGLE, NORTHUP & TERWILLIGER,
Its Solicitors.

PRINGLE, NORTHUP & TERWILLIGER,
Solicitors for Complainant.

35 Endorsed: 9743. U. S. District Court, Nor. Dist. Ill.
 C. T. & T. Co. vs. Federal T. & S. Bk. Amendment to
 Bill. Filed Jany. 26, 1911 at 10 o'clock A. M. T. C. Mac-
 Millan, Clerk.

36 And afterwards, to wit, on the 3rd day of February, A.
 D. 1911, there was filed in the Clerk's Office of said Court,
 in the above entitled cause, a Separate Answer of Federal
 Trust & Savings Bank, same being in the words and figures
 following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois
Eastern Division.

Chicago Title & Trust Co., Trustee
in Bankruptcy of Earl H. Prince,
vs.
Federal Trust & Savings Bank and
W. P. Anderson & Co. } No. 9743.

Separate Answer of Federal Trust & Savings Bank to Amend-
ment to Bill of Complaint.

This defendant reserving to itself all benefit and right of exception to said amendment to the bill of complaint and that the same does not show on its face any right to either discovery or relief as against this defendant concerning the matters therein set forth, by way of plea and answer thereto, says:

1. That by reference it makes its answer heretofore filed herein to the bill of complaint a part of this its answer to said amendment to the bill of complaint, and prays the same advantage thereof as if specially pleaded herein.

2. Further answering this defendant says that the supposed cause of action alleged in said amendment to the bill of complaint herein is not stated in the said bill of complaint, and that the same arose, if at all, more than five years prior to the date of filing said amendment.

FEDERAL TRUST & SAVINGS BANK,
By TENNEY COFFEEN HARDING & SHERMAN,
Solicitors for said defendant.

Endorsed: No. 9743. United States District Court. Chicago Title & Trust Co., Trustee in Bankruptcy of Earl H. Prince. *vs.* Federal Trust & Savings Bank and W. P. Anderson & Co. Separate Answer of Federal Trust & Savings Bank to amendment to Bill of complaint. Filed Feb 3, 1911 ato'clock M. T. C. MacMillan, Clerk.

38 And afterwards, to wit, on the 3rd day of February, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Separate Answer of W. P. Anderson & Co., same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Chicago Title & Trust Co., Trustee in Bankruptcy of Earl H. Prince,	} No. 9743.
<i>vs.</i>	
Federal Trust & Savings Bank and W. P. Anderson & Co.	

Separate Answer of W. P. Anderson & Co., Defendant to
Amendment to Bill of Complaint.

This defendant reserving to itself all benefit and right of exception to said amendment to the bill of complaint and that the same does not show on its face any right to either discovery or relief as against this defendant concerning the matters therein set forth, by way of plea and answer thereto, says:

1. That by reference it makes its answer heretofore filed herein to the bill of complaint a part of this its answer to said amendment to the bill of complaint, and prays the same advantage thereof as if specially pleaded herein.

2. Further answering this defendant says that the supposed cause of action alleged in said amendment to the bill of complaint herein is not stated in the said bill of complaint, and that the same arose, if at all, more than five years prior to the date of filing said amendment.

W. P. ANDERSON & Co.,
By TENNEY COFFEEN HARDING & SHERMAN,
Solicitors for said defendant.

Endorsed: No. 9743. United States District Court. Chicago Title & Trust Co., Trustee in Bankruptcy of Earl H. Prince vs. Federal Trust & Savings Bank and W. P. Anderson & Co. Separate Answer of W. P. Anderson & Co.,

39 Defendant, to amendment to Bill of complaint. Filed Feb. 3, 1911 at o'clock M. T. C. MacMillan, Clerk.

40 And afterwards, to wit, on the 22nd day of May, A. D. ^{Filed}
1911, there was filed in the Clerk's Office of said Court,
in the above entitled cause, a Replication; same being in the
words and figures following, to wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company Trust- tee of Earl H. Prince, Bankrupt.	} No. 9743.
<i>vs</i>	
Federal Trust and Savings Bank and W. P. Anderson & Company	

The Replication of Chicago Title & Trust Compant, Trustee
of Earl H. Prince, Bankrupt, Complainant, to the Separate
Answers of the Federal Trust and Savings Bank and W. P.
Anderson & Company, Defendants, to the Amendment to
the Bill of Complaint Herein.

This repliant saving and reserving unto itself all and all
manner of advantage of exceptions to the manifold insuffi-
cients of the said answers, for replication thereunto, says:
that it will aver and prove its amendment to said bill to be
true, certain and sufficient in the law to be answered unto; and
that the said answers of the defendants are uncertain, untrue
and insufficient to be replied unto by this repliant; without
this, that any other matter or thing whatsoever in the said
answers contained material, or effectual in law to be replied
unto, confessed and avoided, traversed or denied, is true; all
which matters and things this repliant is and will be ready to
aver and prove, as this honorable court shall direct, and
humbly prays as in its said bill and amendment thereto, it
has already prayed.

PRINGLE NORTHUP & TERWILLIGER
Solicitors for Complainant.

42 Endorsed: No. 9743 U. S. District Court Nor. Dist.
of Ills. C. T. & T. Co. Trustee vs. F. T. & S. Bank, et al.
Replication Filed May 22, 1911 T. C. MacMillan, Clerk.

43 And afterwards, to wit, on the 18th day of February, A. D. 1907, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Replication; same being in the words and figures following, to wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company,
Trustee of Earl H. Prince, Bank-
rupt,

vs.

Federal Trust and Savings Bank and
W. P. Anderson & Company.

The Replication of Chicago Title & Trust Company, Trustee of Earl H. Prince, Bankrupt, Complainant, to the Separate Answers of the Federal Trust and Savings Bank and W. P. Anderson & Company, Defendants.

This repliant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto, says: that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto; and that the said answers of the defendants are uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answers contained material, or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in its said bill it has already prayed.

WM. J. PRINGLE &

EDWIN TERWILLEGER

Solicitors for Complainant.

45 Endorsed: No. 9743. U. S. District Court, Northern District of Illinois. Chicago Title & Trust Co., Trustee, etc. vs. Federal Trust & Sav. Bk., et al. Replication. Filed Feb. 18, 1907 at o'clock M T. C. MacMillan, Clerk.

166 And afterwards, to wit, on the 8th day of April A. D. Or
1907, the following order was had and entered of record
in said cause, to wit:

The United States
vs.
Federal Trust and Savings Bank, *et al.* } No. 9743.

On motion It is Ordered by the court that this cause be and the same hereby is referred to Master in Chancery Hervey W. Booth, to hear take testimony and report his conclusion and recommendations thereto to this court.

167 And afterwards, to wit, on the 17th day of June A. D. Or
1910, the following order was had and entered of record
in said cause, to wit:

Chicago Title & Trust Company, Trust-
tee,
vs.
Federal Trust & Savings Bank *et al.* } No. 9743.

Comes the complainant by its Solicitors and enters its motion to re-refer this cause to a Master whereupon the hearing of said motion is continued until June 20, 1910, for hearing.

168 And afterwards, to wit, on the 20th day of June, A. D. Or
1910, the following order was had and entered of record
in the said cause, to wit:

Chicago Title & Trust Co.,
vs.
Federal Trust and Savings Bank. } No. 9743.

Come the parties by their solicitors and on motion It is Ordered by the court that this matter be and it hereby is referred to Frank L. Wean, Esq., who is hereby appointed special Master to hear, take proofs and report same together with his conclusions and recommendations thereon to this court.

169 And afterwards, to wit, on the 14th day of October A. D. 1910, the following order was had and entered of record in said cause, to wit:

Chicago Title and Trust Company, Trustee in Bankruptcy of Earl H. Prince.	} No. 9743.
<i>vs.</i>	
Federal Trust and Savings Bank, <i>et</i> <i>al.</i>	

The order heretofore entered referring the above entitled cause to Frank L. Wean, Esq. as Special Master in Chancery is hereby vacated and set aside, and said cause is now referred to Charles B. Morrison, Esq., as Special Master in Chancery, to take evidence herein, and report the same together with his conclusions of law and fact. By agreement of parties in open court It is Ordered that the evidence heretofore taken in said cause before the late Hervey W. Booth as shown by the stenographers transcript thereof be received by said Master as showing the evidence of the witnesses who so testified without the necessity of recalling them, reserving to all parties the right to object to any of said evidence and giving to said Master full right to rule thereon.

46 And afterwards, to wit, on the 24th day of May, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Transcript of Evidence; same being in the words and figures following to wit:

47 State of Illinois }
County of Cook. } ss.

File
24

IN THE CIRCUIT COURT OF THE UNITED STATES.

In Chancery.

Chicago Title & Trust Company,
Trustee of Earl H. Prince, Bank-
rupt,
vs.
Federal Trust & Savings Bank and
W. P. Anderson & Company.

Proceedings had and evidence taken in the above entitled cause before Hervey W. Booth, one of the masters in chancery of said court, at his office, Room No. 505 Monadnock Block, City of Chicago, County and State aforesaid, at the hour of eleven o'clock, on Tuesday, December 10, A. D. 1907, pursuant to an order of reference entered in said cause and due notice given.

Mr. Edwin Terwilliger, Jr., appearing for complainant;
Mr. M. Lester Coffeen, appearing for both defendants.

48 Mr. Terwilliger: I offer in evidence an agreed statement of facts signed by counsel for the Complainant and counsel for the Defendants in which certain admissions are made.

The Master: Let it be admitted in evidence and marked "Complainant's Exhibit 1."

MARGARET A. LYNCH, called as a witness on behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Terwilliger.

Q What is your name?
A Margaret A. Lynch.
Q Where do you reside?
A Chicago.
Q What is your business?
A Court reporter.

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Q What was your business in May 1905?

A Court reporter.

Q Did you attend a hearing before Referee in Bankruptcy, Frank L. Wean, on the 24th day of May 1905 in the matter of the bankruptcy of Earl H. Prince?

A Yes, sir, I did.

Q In what capacity did you attend there?

A I reported that hearing.

Q Do you recall a witness by the name of Charles R. Castle being sworn in that proceeding?

A Yes, sir.

49 Q Have you your notes, stenographic notes of the testimony taken at that time with you?

A Yes sir.

Q Will you please refer to them and tell me if this question was asked Mr Castle by myself?

Mr Coffeen: I object to this evidence by this witness on the ground that it is incompetent, immaterial, and is not the best evidence of what occurred on the occasion referred to.

Mr Terwilliger: If the Master please, the purpose of this evidence is to show knowledge on the part of the defendant bank of the insolvency of Mr Prince at the time of the transfer of the property which is claimed to be a preference. He was sworn as a witness in that case and made certain admissions against interest of the bank. It is not disputed, that Mr. Castle was an officer of the bank at that time. If it is not admitted, of course I will prove it. I don't think there is any doubt about it. He testified that he was.

Mr Coffeen: Oh well, I don't remember just exactly but I think that might be admitted.

Mr Terwilliger: Let the record show that he was an officer of the Federal Trust and Savings Bank at the time this testimony was given. I understand the rule to be that admissions either in court or outside of court are against the interests of the bank.

50 The Master: You say he was an officer. What was his position?

Mr Terwilliger: He was Vice-President of the Federal Trust and Savings Bank.

The Master: The witness may answer, subject to the objection. I am not prepared to rule upon it at present.

Mr. Terwilliger: Q Was this question asked of Mr Castle? "Do you know how much Prince realized from the closing out of his trades to Anderson and Company?"

Mr Coffeen: It is understood this objection applies to all of this testimony of the witness before the referee.

The Master: It may be understood that the Defendant's objection is interposed to all the testimony of this character.

Witness: A Yes, I have that question.

Mr Terwilliger: Q What was the answer of Mr Castle to that question?

A "I would not be able to tell positively about the items here whether they were—the credits, whether they were derived from closing out of the accounts on the board or whether they were derived from the sale of collateral, without looking for them in the record."

Q Was this question asked Mr Castle: "You can find that out from looking at your records?"

A Yes, that is the very next question.

Q Yes, what was the answer to that question by Mr Castle?

A "Yes, we can ascertain that."

Q What was the next question?

A Question: "Have you any independent recollection as to how much he received from that source?"

Q What was the answer?

A "I should say \$7000 or \$8000, something of that sort."

Q What was the rest. Give any further answer to that question?

A "Mr. Harding said he received it. Mr Terwilliger said Mr Prince. Witness: "Well, I might say Mr Prince did not receive anything. They were credited on his loans."

Q Was this question asked: "They were credited to his loan to the bank, you mean?"

A Yes, that is the very next question.

Q What was the answer?

A Answer, "Yes."

Q Was this question asked Mr Castle: "The bank received \$7,000 or \$8,000 from Mr Anderson?"

A That is the very next question.

Q Just say yes or no?

A Yes, sir.

Q What was the answer to it?

A Answer: "That is my remembrance."

Q What was the next question and answer?

52 A Question: "When did they receive that?" Answer: "The 15th and 16th of February."

Q Was this question asked Mr. Castle: "Did you know who was going to close out his trades before it was done?"

A Yes, sir.

Q What was the answer?

A Answer. "Yes."

Q Was this question asked Mr. Castle: "Did you advise him to go to any particular man to have it done?"

A Yes sir, that question was asked.

Q What was the answer of Mr. Castle?

A Answer: "Yes, I guess I did, yes."

Q Was this question asked: "You stated the name of Anderson to him, did you not?"

A Yes sir.

Q What was the answer?

A Answer? "Yes."

Q Was this question asked: "Had you known Mr. Anderson before this?"

A Yes sir.

Q What was the answer?

A "yes."

Q What was the next question and answer?

A Question: "Had dealings with him?" Answer: "Yes."

Q What was the next question and answer?

Mr. Terwilliger: You don't object to the form of my examination?

Mr. Coffeen: No.

Witness: A Question: "Did Mr Prince discuss any other brokerage house as the proper one to go to?" Answer: 53 "I am not sure about that."

Q What was the next question and answer?

A Question: "Was there any difference of opinion between you and Mr Prince as to who to go to?" Answer: "I think not."

Q What was the next question and answer?

A Question: "Why did you suggest he should have his trades closed out?" Answer: "As I understand the Board of Trade business the closing out of the trades if a man is unable to meet his clearing house charges against him, it is an economical arrangement. I am not familiar with the methods of the Board enough to understand why, but the closing out of the trades is a saving, an economical arrangement."

Q Is that all you have there?

A "And they might step in"—then Mr. Harding interrupted: "Just a moment—

Q Wasn't Mr Harding's interjection: "Just a matter of bookkeeping, wasn't it?"

Mr Coffeen: I suppose you had better read her minutes.

Witness: A There is first the words: "Just a moment," and then after that I may have left that out. After that Mr Harding's remark was like this: "just a moment. It is a matter of bookkeeping, isn't it?" Answer: "No, I don't think it is entirely."

Q Was this question asked Mr Castle: "Mr Castle, you know, I suppose, as a matter of experience, the closing
54 out of the broker's trades, as Mr Prince did, is an indication of his being in failing circumstances?"

A That question was asked by Mr Terwilliger.

Q What was the answer to it?

A Answer: "Yes."

Q Was this question asked: "You knew when you advised him and he agreed to that that he was in failing circumstances?"

A Yes, sir.

Q What was the answer to it?

A Answer: "I knew that he was in need of funds for the continuation of his business."

Q Was this question asked: "Well, from your experience with commission firms and members of the Board of Trade was that an usual and ordinary way of raising money for their business purposes?"

A Yes, sir.

Q What was the answer? A Answer: "I don't know as I just understand that question."

Q Was this question then asked: "Is that the usual and ordinary way of raising money for business purposes, by closing out of their trades?"

A Yes sir.

Q What was the answer to it?

A Answer: "No, I don't understand that it is resorted to for the purpose of raising money. I understand that is resorted to for the purpose of avoiding losses in the event of a man not being able to pay his clearings."

Mr Coffeen: I would like to have it appear that I object to the counsel prompting the witness.

55 Mr Terwilliger: I have a distinct recollection outside of that.

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Q Was this question asked Mr. Castle: "Did you know Mr Prince was not going to be able to pay his clearings?"

A That question was asked.

Q What was the answer?

A Answer: "I didn't know that, no.

Q Was this question asked: "Didn't he tell you that? Didn't you recommend this?"

A Yes, sir, that question was asked.

Q What was the answer?

A Answer: "I am not sure but he did tell me that."

Q Was this question asked: "And you recommended this as a means of avoiding that, did you not?"

A Yes sir, that question was asked.

Q What was the answer? A Answer: "I think that the recommendation came from Mr Prince and was concurred in by us. That is my recollection."

Q Was this question asked: "You know from your experience that such matters, that the closing out of the trades, as Mr Prince did, is the usual forerunner of a failure, don't you?"

A That question was asked.

Q What was the answer?

A Answer: "Not in all cases, but it is usual, yes.

Q Was this question asked: "Did you know at that
56 time that Mr Prince was going into bankruptcy?"

A Yes, sir.

Q What was the answer?

A Answer: "No."

Q Was this question asked: "When was bankruptcy first discussed between you and Mr. Prince?"

A Yes, sir.

Q What was the answer?

A Answer: "I think when Mr. Prince told me that there was a petition in bankruptcy being prepared."

Q Was this question asked: "And did you recommend him to go into bankruptcy?"

A Yes, sir.

Q What was the answer?

A Answer: "No."

Q Was this question asked: "You discussed it before he had actually decided that he would go into bankruptcy, had you not?"

A Yes, sir.

Q What was the answer?

A Answer: "I don't remember; I am not sure about that."

Q Was this question asked: "When you called his loan on the 10th, between that time and the closing of his trades did you have a conference with him?"

A Yes, sir.

Q What was the answer?

A Answer: "Mr. Prince was in the bank every day."

Q Was this question asked: "When you call a man's loan, does that mean it is to be met?"

A Yes, sir.

Q What was the answer?

A Answer: "I wish it did."

Q Was this question asked: "It is a demand for the payment of paper that is due, isn't it?"

A Yes, sir.

57 Q What was the answer?

A Answer: "Yes, Mr. Prince's loans were all of a demand character, they are due at the time."

Q Was this question asked: "Did the Federal Trust & Savings Bank have any interest in any of the open grain trades that were closed out through Mr. Anderson?"

A Yes, sir.

Q What was the answer?

A Answer: "No."

Q Was this question asked: "Did any members or officers of the banks?"

A Yes, sir.

Q What was the answer?

A Answer: "No."

Q Was this question asked: "Had you agreed with Mr. Prince at the time you undertook the closing out of the trades proceeds of the sale would be paid to the bank?"

A Yes, sir.

Q What was the answer?

A Answer: "I didn't understand that any agreement was necessary."

Q Was this question asked: "Well, he said that he would do that, did he? You expected him to do that?"

A Yes, sir.

Q What was the answer?

A Answer: "We expected him to do that, certainly."

Q Was this question asked: "You knew at that time that he was insolvent?"

A Yes, sir.

Q What was the answer?

A Answer: "Mr. Prince had talked of securing assistance, I don't know but even after the petition in bankruptcy was prepared, I know for several days he was in expectations of raising some money that would enable him to settle it and continue in business."

Q Was this question asked "You knew without such assistance he was insolvent?"

A Yes, sir.

Q What was the answer?

A Answer: "I suspected it."

Q Was this question then asked: "You believed it, didn't you?"

A Yes, sir.

Q What was the answer?

A Answer: "Yes."

Q Was this question asked: "Did the bank pay any checks out of the proceeds of the closing out of the trades?"

A Yes.

Q What was the answer?

A Answer: "No."

Q Was this question asked: "You applied it upon the indebtedness, didn't you?"

A Yes, sir.

Q What was the answer?

A Answer: "Yes."

Q Was this question asked Mr. Castle: "Do you know how Mr. Anderson paid the money over, whether by cash or check?"

A Yes, sir.

Q What was the answer?

A Answer: "I presume there was a check, I am almost confident it was."

Q Was this question asked: "Was that to the order of the bank or Mr. Prince?"

A Yes, sir.

Q What was the answer?

A Answer: "I can't say."

Q Was this question asked "Does your other record show that?"

A Yes, sir.

59 Q What was the answer?

A Answer: "We can ascertain that."

Q Was this question asked, Mr. Castle: "On or about December 1st he owed the bank \$60,000.00?"

A Yes, sir.

Q What was the answer?

A Answer: "Yes."

Q Was this question asked? "Did you—"

Mr. Terwilliger: When I don't specify the name of the witness it is understood it is Mr. Castle.

Q Was this question asked: "Did you call upon him—ever call his loan before you called it on February 10?"

A Yes, sir.

Q What was the answer?

A Answer: "No."

Q Was this question asked? "Did you have a talk with him about purchasing his notes?"

A Yes, sir.

Q What was the answer?

A Answer: "I wouldn't be surprised if we did."

Q Was this question asked: "Did you know about the \$24,000.00 certificate of deposit that there has been some trouble about between Mr. Prince and Mr. Wolff?"

A Yes, sir.

Q What was the answer?

A Answer: "Yes."

Q Was this question asked: "When did you first learn that that certificate of deposit was disputed by the Parkersburg State Bank?"

A Yes, sir.

Q What was the answer?

60 A Answer: "Well, I could only say from memory but some time prior to February 16."

Q Was this question asked: "Wasn't that the reason that you called the loan, because you found out there was a dispute about that certificate?"

A Yes, sir.

Q What was the answer?

A Answer: "Yes."

Q Was this question asked: "That is one of the reasons I mean?"

A Yes, sir, that question was asked.

Q What was the answer?

A Answer: "Yes."

Q Did the referee in bankruptcy ask this question: "That must have been before February 10, wasn't it?"

A Yes, sir.

Q What was the answer?

A Answer: "It was before February 10. The first I knew about the dispute—of that was the loan was not called."

Mr. Terwilliger: That is all.

Cross-Examination by Mr. Coffeen.

Q You have been referring during this examination to the minutes you took at the examination before the referee?

A Yes, sir.

Q You are not very clear at this time just exactly what was said and done at that time, are you?

A Only from the notes, Mr. Coffeen. I stumbled over two words, but if I had looked at them a moment I don't think I would have done that.

61 Q Isn't it possible that you have made other mistakes than those two words?

A Not in this reading.

Q You are sure that these are all positively correct, that you have testified to?

A Yes, sir.

Q Don't stenographers make mistakes frequently, get the wrong word?

A Not frequently.

Q They do sometimes?

A Yes, I did it twice this morning.

Q It is possible with you of course, the same as it is with others?

A Yes, sir.

Mr. Coffee: That is all.

Mr. Terwilliger: May I ask one more question?

Q How many years have you been a court reporter?

A Ten years.

Q In Chicago?

A Yes, sir.

Mr. Terwilliger: I wish to state before testifying that no transcript of the testimony of Mr. W. B. Anderson was made, and that there is no other means of proving his evidence than through my own testimony, and that I hesitate to offer my

own testimony on the grounds that it is not in accordance with the highest standard of legal ethics for a lawyer to testify in a case in which he appears; and that if the testimony offered by me shall be disputed by Mr. Anderson, I will at least consider the advisability of letting it be stricken 62 out of the record.

Mr. Coffeen: I object to any statement by the counsel, any evidence by the counsel of any purported testimony given by Mr. Anderson in the bankruptcy proceedings at any time on the ground that it is immaterial, irrelevant and is not the best evidence of what occurred before the referee.

The Master: I suppose, Mr. Terwilliger, that you simply claim that this testimony was competent so far as it amounts to an admission against the parties' own interest.

Mr. Terwilliger: Yes, that is the purpose of it.

The Master: So far as the testimony shall be in the nature of an admission against the defendants' interests my ruling would be that it would be admissible, but inasmuch as it is impossible to rule in advance whether the testimony is in the nature of an admission or not, it will go in subject to counsel's objection.

63 EDWIN TERWILLIGER, JR., having been first duly sworn, made the following statement: Te

My name is Edwin Terwilliger, Jr. I am an attorney at law.

On or about May or June, 1905, I conducted an examination of W. P. Anderson, before Frank L. Wean, referee in bankruptcy; in the matter of Earl H. Prince, bankrupt, Mr. Anderson was sworn as a witness in that case and testified that he was the president, I believe, of the W. P. Anderson Company, or W. P. Anderson & Company, I have forgotten which, the defendant in the bill. I asked him to state how he came to be mixed up in the transfer of trades to him by Earl H. Prince, how the arrangement occurred. He stated that Mr. Castle called him over to the bank, and that upon his coming there he found Mr. Castle and Mr. Prince together, and that Mr. Castle told him that Prince was in financial difficulties and was going to fail and quit business, and that they wanted his advise about how to dispose of Prince's business. Mr. Prince stated while the three of them

were together, that his open trades were about evenly balanced, that there was some margin in his favor in his trades.

Mr. Castle stated to him that Prince had several thousand dollars—that Prince had deposited several thousand dollars in margin deposits to protect his open trades, and Mr. Anderson advised Mr. Castle and Mr. Prince that the best way to handle the matter would be to transfer his trades and in that way save the margins from being sacrificed, as otherwise, in the confusion of closing out, Mr. Prince's trades on the floor of the Exchange, the margin securities would be sacrificed. That he and his clerks worked late at night following this conversation, which my recollection is was had, according to Mr. Anderson's testimony, about the 13th of February, 1905, or at least just a day or two before the bankruptcy. They worked late at night, preparing a list of Prince's open trades on the Board of Trade and arranging to transfer them; that they were transferred to Anderson & Company, and that Mr. Castle told Mr. Anderson, that in case he needed assistance, financial assistance in the way of margins on account of taking over these trades, the bank would furnish it to him; that Prince turned over to him his margin certificates and that Anderson & Company as soon as the trades were transferred on which margins were deposited, secured the release to the other parties of the margin certificates, and Anderson & Company took them to the bank.

Mr. Terwilliger: That is all.

65 The Master: Well, in regard to the admissibility of the admissions is based on the supposition that Anderson was personally defendant, or one of the defendants. I see that it is Anderson & Company, and there will still be the question as to whether the admissions made under such circumstances would bind the company.

Mr. Terwilliger: Well, I will prove otherwise, that Mr. Anderson was the president of the W. P. Anderson & Company at that time, if it is not admitted.

Mr. Coffeen: I can't make that admission because I don't know anything about it.

I make a motion to strike out all of the testimony of the witness.

The Master: Motion may be entered and ruling upon it will be reserved.

Mr. Terwilliger: I presume Mr. Coffeen can inform himself about the fact of Mr. Anderson's agency at that time

and he may be willing to admit it without calling upon Mr. Anderson to prove that fact. If not before the next hearing, why, then I will produce evidence. Testimony

Well, that it all the evidence I have to produce at this time, your Honor.

Mr. Coffeen: I would like to reserve the right to cross-examine Mr. Terwilliger.

The Master: Let the record show that further hearing is adjourned subject to notice.

Whereupon an adjournment was taken subject to notice.

67

December 1, 1909,
3.30 o'clock, P. M.

Parties met pursuant to notice.

Present: Messrs. Tenney and Terwilliger.

WALTER S. BLOWNEY, called as a witness in behalf of the complainant, being first duly sworn, testified as follows: Testimony

Direct Examination by Mr. Terwilliger.

Q What is your name?

A Walter S. Blowney.

Q What is your business?

A Assistant secretary of the Chicago Board of Trade.

Q How long have you been such secretary?

A Since 1903.

Q Do you know the Federal Trust & Savings Bank? Do you know that bank, the Federal Trust and Savings Bank?

A I did at the time it was in existence.

Q In 1904 and 1905 was the Federal Trust and Savings Bank a Board of Trade depository?

A 1904 and 1905; part of the year 1905, and all the year 1904.

Q Was the Federal Trust & Savings Bank a Board of Trade depository during the month of February, 1905?

A Yes, sir; it was.

68 Q And previous thereto?

A From August 20, 1902.

Q Did the Federal Trust and Savings Bank ever file with the Board of Trade the bond required by the rules of the Board of Trade?

A It did.

Q I show you this document. Is that the bond they filed?

A It is.

Mr. Terwilliger: I offer that bond in evidence, simply to show the relation of the bank to the Board of Trade and its members.

Mr. Tenney: Well, I object to it as immaterial.

The Master: The objection will be overruled, and the paper just offered will be admitted in evidence and will be marked Complainant's Exhibit No. 2.

Mr. Terwilliger: I would like leave to substitute a copy for that. Is there any objection, Mr. Tenney?

Mr. Tenney: No objection.

The Master: A copy may be substituted for the original, and the original retained by complainant's counsel, subject to being produced at any time hereafter when required either by the court, by opposing counsel, or by the Master.

Mr. Terwilliger: Q Do you know anything about the posting of a notice signed by Earl H. Prince and W. P. Anderson & Company in February, 1905, notifying members of the

Board of Trade of the transfer of Mr. Prince's trades to
69 Mr. Anderson?

A Nothing except as I remember the case. Nothing definite.

Q From your experience on the Board of Trade and in such matters what does such action in the majority of cases indicate?

Mr. Tenney: That is objected to as not competent evidence; immaterial.

The Master: The witness may answer.

Mr. Tenney: Is the notice included in our stipulated facts?

Mr. Terwilliger: Yes, it is in the stipulation of facts.

Mr. Tenney: I don't know whether it has been called to your attention, Master Booth; there is in this case a stipulation of certain facts, which includes among other things the notice that counsel refers to, the notice in writing; and it seems to me very plain to ask what it indicates is objectionable.

The Master: The purpose is of course to avoid proof by testimony of what is already stipulated, and if this which the gentleman is asking has been already covered by stipulation of course it is not necessary to prove it by testimony.

Mr. Tenney: His question is, what does such a notice indicate. Now here is the notice It could hardly indicate

anything that is not contained in it, and of course we can not prove anything that is inconsistent with what has 70 been thus formally admitted. It seems to me immaterial what the notice would indicate that is not in it; and what is in it is here.

(The question was read.)

Mr. Terwilliger: I mean what conclusions the members of the Board of Trade and people dealing with the Board would ordinarily draw from the fact of a man transferring his trades.

Mr. Tenney: I do not think that is competent evidence.

The Master: The witness may answer subject to the objection.

A That is a hard question to answer in the abstract that way. Of course in a great many cases it indicates a failure. It might indicate retiring from business. It is a difficult question to answer.

Mr. Terwilliger: Q What does it indicate in the majority of cases?

Mr. Tenney: That is all under the same objection.

The Master: Same ruling.

A Well, I should say it indicates a financial embarrassment of some kind in the majority of cases.

Mr. Terwilliger: That is all.

71 *Cross-Examination by Mr. Tenney.*

Q As I understand you, Mr. Blowney, when a man on the Board is going to transfer his trades a notice of the fact is put up?

A Yes, sir.

Q And there may be various reasons why he transfers his trades?

A Yes, sir.

Q The notice is the same whatever the motive is?

A We have no particular wording. A member writes his own notice, and it is posted up.

WILLIAM P. ANDERSON, a witness called in behalf of the complainant, being first duly sworn, testified as follows:

Direct Examination by Mr. Terwilliger.

Q State your name?

A William P. Anderson.

Q What is your business?

A Grain and commissions.

Q Where do you live?

A My residence?

Q Yes.

A 4701 Winthrop avenue.

Q Chicago, Illinois?

A Chicago, Illinois; yes.

Q What connection if any do you have with W. P. Anderson & Company, a corporation?

A I am president and treasurer of W. P. Anderson & Company.

72 Q How long have you been such president and treasurer?

A Since about the first of August, 1902. I don't know the exact date. All the time they have been in business any way.

Q You were sworn and examined as a witness before Referee in Bankruptcy Wean, in the matter of Earl H. Prince, bankrupt?

A Yes, sir. I don't know whether that was the referee's name. I was examined before somebody.

Q When did you first hear of any financial difficulties of Earl H. Prince?

A February the 14th, 1905, about 4 p. m.

Q What did you hear?

A I heard that—

Q What occurred?

A I heard that Mr. Prince was in difficulties.

Q What kind of difficulties?

A That he was financially embarrassed, in financial difficulties.

Q Who told you that?

Vice Pres. See next page

A Mr. Castle, cashier of the Federal Trust and Savings Bank.

Q Where did that conversation take place?

A In the office of the Federal Trust and Savings Bank.

Q Who were present?

A Mr. Prince and myself.

Q Who else?

A I am not sure whether Mr. Scheidenhelm was there or not.

Q Mr. Castle was there?

A Mr. Castle, Mr. C. S. Castle. I guess I am wrong in saying he was cashier. I guess he was vice president at the time of the Federal Trust and Savings Bank.

Q Do you recall the details of that conversation?

A I might give you the conversation about as I recollect it. It is a long time ago, 1905; it was four years. Mr. Castle called me up on the telephone and asked me to come over there, and I went over and I found Mr. Prince there. And Mr. Castle after some little talk informed me that Mr. Prince was in difficulties, and said he had quite a number of open trades, what was the best way to close those trades.

I suggested that the best way to close those trades was to transfer them to somebody, to close them up in that way; it would depend upon what trades he had open. He said, well as far as the market was concerned, he had a very small interest one way or the other, but he had quite a number of trades open, unsettled. I said, "Well, in that case the best way to do would be to transfer them." And he asked me if I would be willing to take those trades and close them up. I said I would do so if the trades showed profit; if I was furnished with a list of the trades, all of the open trades, and found that they had a profit, or about even on the market, that we would take them. He said, "Well, I wish you would look into this matter for us."

74 And I stayed down that night with my partner Mr. W.

S. Booth, who was secretary at that time. Along about nine o'clock at night Prince's office began to furnish us with a list of their trades. We went over them and checked them with their books to the best of my ability. And Mr. Castle and Mr. Scheidenhelm were down in our office as late as 11.30. We looked over the trades, and I said that it looked as if it was all right, and Mr. Castle requested us to take the trades over if it was all right.

The Master: Q What do you mean by "all right"?

A Well, if the trades would show no material loss in them. If the trades showed no material loss in them.

As near as I can recollect it, there was in those trades, if they were all closed up for their joint interest, perhaps two hundred dollars in them. That is as near as I can recollect.

Mr. Terwilliger: Q You mean profit?

A That is, there would have been that in them. But we would have had to be paid for our labor under the rules of the Board of Trade, which compelled us to charge commissions upon the trades, which would leave a small loss in the trades. Mr. Castle guaranteed us that small loss, and we took the trades over. As I recollect it, I have looked at our books, the E. H. Prince account on our books, when we closed up these transactions they owed us \$463.12.

The Master: Q By that you mean there was that 75 amount less than—

A That amount including our commissions. We charged something over five hundred dollars commissions. I can not recollect exactly.

Mr. Terwilliger: Q Is it not a fact that you also paid clearing house balances due for Mr. Prince, to the extent of about nine hundred dollars out of that fund?

A Yes, we paid— I looked on the books today. I think there was one check—I didn't put those figures down—I think it is \$62.50, and the other \$768. That is as near as I can recollect, just glancing at it hastily today.

Q So that out of the result of the transferring and closing of the trades you secured enough to pay yourself back for those advancements?

A Those were all figured into the trades, some of those settlements were put in there after we took the trades. That is, trades were settled, and instead of letting them go through our books they were put right through Prince to close them right up at that moment. That is, somebody would come in that morning and say, "I have a ring here." Put it in. That is a settlement.

Q By the term "open trades" you mean a time contract for the sale or purchase of wheat or other commodity on the Board of Trade?

A Yes. I happen to recollect one incident on that 76 list. We trade over on the Board in five thousand bushel lots and in one thousand bushel lots in wheat. There is a thousand bushel lot trading in wheat. Now, E. H. Prince

had on his books, I think there was ninety-two trades in one thousand bushel lots, and I think there was ninety-three trades on the other side. There was about one or two thousand it was either short or long. Now those ninety-two thousand bushels bought at one price and sold at another, if the trades were all closed right up in the settlement, there would not have been fifty dollars difference in them.

Now if we had taken those trades upon the market—that is, they said Prince was in difficulties and everybody closed him out; one man would have gone in there to buy and another to sell, and I never have seen trades closed up in that way but that instead of having fifty dollars loss there wouldn't have been five hundred loss. In times like that a man gets excited and bids up, and a man goes to sell and he gets excited and sells down. That is just an example. I say that because that is a very clear case of what would happen in all of the trades had they been closed in the open market.

Q About how many open trades of all kinds did Prince have?

A That I could not tell you, Mr. Terwilliger.

Q Approximately?

77 A I could not tell you approximately without referring to the books, but I don't know. I happen to remember that thousand bushel lots because it showed the carelessness of anybody running their office and letting it get that way when there was only fifty dollars difference.

Q Would you say there was a thousand open trades?

A What do you mean by open trades? In bushels, or in the identity of the transactions?

Q I mean in the identity of the transactions.

A That would involve another thing, on the bought side and on the sold side.

Q It took you several hours that night to go over them?

A We were that night getting the details of those things together. We retired about half past two or quarter of three in the morning. The next night we were down at the office late doing other details.

Q It must have involved a large number of open trades.

A There was quite a number; but, Mr. Terwilliger, it would be impossible to be accurate. I would not dare to say a thousand. It might be only five hundred. These five thousand bushels involves a trade. There was ninety-two trades in what we call job lots, one thousand bushel lots. There may

possibly have been five hundred and possibly a little more. I would make an estimate of that without attempting to be accurate.

78 Q Prince's trades were very nearly even on the Board, were they not, open trades?

A They were very nearly even, yes.

Q That is he had as many lots of commodities bought as he had sold approximately?

A No. Yes, approximately. There was a little, I have forgotten. I think in order to close up those transactions I think we had to trade in less than one hundred thousand.

Q One hundred thousand what?

A One hundred thousand bushels. That is a long time for me to remember. My recollection is about two or three thousand job lots. There was about thirty thousand oats and corn, and I don't believe there was fifty thousand wheat. I think there was two hundred and fifty barrels of pork. I am not sure.

Q Can you give any approximate figures showing or indicating the entire amount that would have been due to Prince upon those contracts which showed a profit?

A No, I can not. I can not give you the least approximate. I never figured it that way.

Q Could you by further investigation of your books?

A There might be something, some way of determining that, but that would be a very hard thing to do. It would depend upon what day, time in the day those figures were taken, and it would be an unjust estimate because in those trades— You must remember that the day we took over
79 these trades of Prince's the market was in a highly excitable state.

Q Was it on account of Prince's failure?

A No. A long drawn out bull market in which John W. Gates was interested was on. Wheat had bounded up. In fact if it had been announced that morning that Prince had absolutely failed and his trades were to be closed out in the open market it might have made a difference of ten cents a bushel in the market. It was in that excitable state. Wheat was around 121 to 123, something near. It had been bounding up by leaps and bounds, two or three or five cents a day. Now you could not tell— And on that very day in which they did close, I am not positive, but my recollection is that it was a very excitable day, and wheat bobbed around four

or five cents a bushel that day. Now it would be a very difficult thing to make an approximate of how much profit and loss there was in that trade, unless you will define what the market was going to do that next day with changed conditions.

Q On the basis of the selling prices on that day can you give any approximate idea of what the trades were worth to Prince that showed profits and what the liabilities were on the other trades?

A I presume something might be figured out on that score. It would take a good long time of a very expert man.

Q Can you from your knowledge of the number of trades?

80 A No, I could not.

Q Give any approximate?

A No, I would not attempt to make any approximate on it without somebody figured on it accurately.

Q Do you think it would amount to as much as five thousand dollars?

A I could not say.

Q What if anything was said, Mr. Anderson, by Mr. Castle or Mr. Prince or yourself about the margin certificates that had been issued by the Federal Trust and Savings Bank?

A I don't know of anything. Yes, there was something said. Prince's trades at the market had very little difference in them. There was very little in them one way or the other, but that he had something over three thousand dollars up as protection upon these trades.

Q Now was there anything said by any of the parties about what would happen to these deposits in case the trades were not transferred?

A I do not know that either Mr. Prince or Mr. Castle said anything about that. I think I probably said that there would not be much of them left.

Q Do you recall any such conversation?

A None whatever. I know I thought it. I don't know whether I mentioned it or not. I know I thought it, the way the market was, there probably wouldn't be but very little left of any of those.

81 Q Now after the trades were transferred were these margin certificates turned over to you?

A When I took the trades and the trades were transferred to me they were my individual transactions, and at

the same time I asked the party who had the trade with Prince to endorse the certificates, which they did.

Q Then the certificates were turned over to you, were they?

A And by our messenger, yes, by our messenger they were handed to the Federal Trust and Savings Bank.

Q You answer yes to that question; they were turned over to you?

A Well, the certificates were handed to me by Prince's office, with the original transactions.

Q Yes.

A When all trades were transferred to us the margins were endorsed and by us handed to the Federal Trust and Savings Bank.

Q Did you yourself take them to the bank?

A I may have taken part of them, but only a very small part.

Q To whom did you give them, to what officers of the bank?

A I could not tell you. I don't know whether I handed them to Mr. Castle or Mr. Scheidenhelm. I have no recollection.

Q Now the amounts that were coming to Prince upon the trades that showed profits were collected by you through the Board of Trade clearing house, were they not? and you paid the—

82 A There were no profits accruing to Prince. After the trades were turned over to us they were our trades and our profits.

Q You misunderstand my question. Those trades that showed a profit to Prince were collected by you through the clearing house, and you paid to other members of the Board the profits that were due to them on the trades that showed a loss to Prince; isn't that the fact?

A I beg pardon.

(The question was read.)

A The trades were our individual trades. The minute we took them they were not Prince's trades at all.

Q Well, I mean that you then proceeded to settle the trades?

A We would settle the trades up as our own, not any recognition of Prince in them. The minute we took those trades they were ours. Prince had no interest in them.

Q You collected profits and paid the losses yourself through the Chicago Board of Trade Clearing House? Tee-
X

A The trades came up in the usual manner, and payments and settlements and collections were made through the clearing house.

Q Were any of these contracts actually carried out by delivery of the commodities purchased or sold?

A Well, I could not tell you because I have no recollection of how long those transactions stood open.

Q It was quite unusual to settle them except by rings, was it not?

A Oh, no. It is quite common to settle them by deliveries, very common. There was 460,000 bushels of oats on delivery upstairs today and 120,000 corn.

Q You do not recall then whether these trades were settled by delivery or not?

A I could not say, because you see this Prince transfer was in February. These trades were mostly May wheat and further off futures. Now whether any of those original trades were open on the first day of May or during the month of May I could not tell you without referring to my books. I could probably dig that out approximately on our books.

Q Do you know whether all these margin certificates were turned over to the bank by you before the petition in bankruptcy was filed against Prince?

A I have no record of when the petition in bankruptcy was filed. Those margin certificates were all deposited—were all endorsed July 15, and in the hands of the Federal Trust and Savings Bank by the close of business February 15, 1905.

Q In any of the interviews between you and Mr. Castle at which you were present did you hear the question of the bankruptcy of Prince discussed?

A The first I knew of the bankruptcy of Prince was on the 16th, sometime in the afternoon. I went over into

Prince's office and found a notice on Prince's door that a receiver in bankruptcy had been appointed.

The Master: Q The 16th of what?

A February 16th, in the afternoon of February 16th.

Mr. Terwilliger: Q Didn't you know before that time that a petition in bankruptcy was being prepared against Prince?

Q. A I had no knowledge of it, except that which I found on the door.

Q Well, had you heard it discussed by Mr. Castle and Mr. Prince that such action was imminent?

A No, I had not. I had not.

Q Did Mr. Castle say anything about how much Prince owed the bank?

A He did not.

Q Is it not a fact, Mr. Anderson, that such action as was taken in this case by Mr. Prince in transferring his trades usually indicates a failure?

A Well, it indicates financial embarrassment of some kind. It does not always indicate failure.

Q It usually does, doesn't it?

A It usually indicates financial embarrassment.

Q Don't you remember advising Mr. Castle that the best way to handle the matter would be to transfer his trades, and in that way save the margins from being sacrificed?

A Well, I recollect saying that it would be the best way of closing up the trades and saving further losses.

Q Didn't you testify to that effect before the Referee?

A No, I could not recollect without you reading me the evidence.

Q Did Mr Castle say anything to you about furnishing you with financial assistance in the way of margins, if you needed it, in the way of taking over these trades?

A No, sir.

Q What was said about that?

A I have no recollection of that. I have no recollection of that. He did not ask any assistance from the bank, I believe.

Q Didn't they say they would stand back of you if you needed it?

A I have not any recollection of that. We were in good financial condition. We had plenty of money in the bank, and we hustled around to settle what trades we could as fast as we could, and I am sure we did not ask the bank any assistance.

Q Mr. Castle may have made that remark during the conversation, that they would assist you if you needed it?

A Well, it is possible, but I think we possibly would have

shown that we would need it before we would go to him and ask.

Q What is the closing time of business on the Board of Trade?

86 A One fifteen week days and twelve o'clock on Saturdays.

Q Then when you say these certificates were turned back to the bank before closing time you mean—

A I mean the bank's closing time.

Q Oh, before three o'clock?

A The bank's closing time, yes.

Q Do you recall the hour at which the last certificates were taken over to the bank on the 15th of February, 1905?

A I believe there is one certificate that I turned in a little after three o'clock, but all the rest of them were turned in considerably before that. Now what time I could not say. That is, myself. You know when you send the boys around they always manage to do something in a negligent manner, and somebody has to go tracing up something.

Q Do you remember which certificate it was that you—

A I believe it was a certificate of C. H. Candy & Company for \$250., something of that kind.

Q Now after these trades were transferred to you you either bought or sold enough of the several commodities to balance the accounts?

A Yes, we were given instructions by Prince. Prince signed orders to us to close up those transactions.

Q And after that of course the fluctuations in the market cut no figure?

A They cut no figure whatever as far as interest in the trade was concerned.

87 Mr. Terwilliger: I think that is all I care to ask.

Cross-Examination by Mr. Tenney.

Q. You mean after the trades were closed the fluctuations in the market made no difference?

A After the trades were closed and they were all transferred to us the fluctuations in the market made no difference to Prince in any way.

Q Then you did not close them on the Board immediately they were transferred to you; I mean not at that moment?

A No.

Q Then you at that time had considerable volume of business in the way of open trades on the Board yourself?

A Yes, sir.

Q And as I understand it these open trades that were transferred to you from Prince were settled up in connection with your own trades?

A Yes, they were settled with any of our trades.

Q It is customary on the Board for members dealing with each other to settle their off-setting trades by what is called ringing, is it not?

A Yes, sir.

Q By which trades in the clearing house, trades in the same commodity, are offset against each other?

A Yes, sir.

88 Q And in that way trades for future delivery are often closed out a considerable time before the maturity of the trade according to its terms?

A Yes, sir.

Q You don't know how long it was before any of these trades were closed up? That is, take any individual trade.

A No, I could not tell an individual trade.

Q And when you closed them up as a part of your business did you make any new trade for the purpose of closing them up, or just ring them in with the volume of business you already had on hand?

A Ringed them in with the volume of business I already had on hand.

Q Now as I understand it, the effect of this transfer of trades is to prevent or minimize a loss that otherwise would happen?

A Yes.

Q And in this particular case it was feared that a loss would take place which would destroy whatever value there was in these margin certificates?

A Yes, sir, that is true.

Q From what you know of the market and what you knew at that time it was your judgment that such a loss would occur to an extent perhaps that would entirely wipe out the value of the margin certificates, was it not?

A Yes, sir.

Q Unless the trades were transferred as they were?

A Yes.

Q Such a transaction is a usual thing on the Board of Trade?
89 Trade?

A Well, it is not usual. You can not say it is usual, but it is of quite frequent occurrence for just such cases as that, and just such reasons as you have described.

Q Now after these trades were transferred to you, as I understand it, you substituted for the margin certificates which Prince had up your own security?

A Yes, sir.

Q And those which Prince had up were then taken and delivered to the Federal Trust and Savings Bank?

A Yes, sir.

Q They were certificates which had been issued by that bank, were they not?

A As I recollect it they were certificates issued by the Federal Trust.

Q As one of the Board of Trade depositories, as they are called?

A Yes, sir.

Mr. Tenney: I think that is all.

Re-direct Examination by Mr. Terwilliger.

Q Mr. Anderson, you stated that at Mr. Prince's direction you either bought or sold commodities enough so as to make the trades you had taken over absolutely even; is that right?

A Yes, that was right. That was the understanding when we took the trades he was to tell us if there wasn't anything—

Mr. Tenney: The question he puts is whether you
90 made a new transaction.

Mr. Terwilliger: Q Did you buy on his order or sell on his order additional commodities, so as to make the—

A The instructions were that when we took these trades we were to buy enough the next morning at the opening to even up his trades on the market.

Q So that you had as much bought as you had sold?

A Yes, that was it.

Q Then after that it did not affect you at all when the market fluctuated?

A No, it did not affect us at all.

Q Now, if the trades had not been transferred, but had

been closed out on the Board, those trades which showed a profit to Prince might have still netted him a profit, might they not?

A Well, it is possible. It is possible some of them might, but the probability is that in the aggregate the loss would have been quite large. The market, Mr. Terwilliger, might have been on a panic at the actual closing of these trades the next morning. The market was exceedingly nervous and excitable, and when you get anybody posted that way you can not tell where it is going to end. Prince might have had some trades open with somebody, and you know these fellows up there are anticipating everything. They might have
91 anticipated and exaggerated the importance of Prince's open transactions, and a panic might easily have resulted from it.

Q Then it is entirely a matter of conjecture about what the result would have been if the trades had not been transferred?

A No, it is not conjecture. It is a sure thing.

Q It is a sure thing it would have ended in some loss, but you can not tell the extent of the loss?

A It is a sure thing it would have been a heavy loss.

Q There still might have been some profit to Prince on some of his trades?

A Yes, there might have been.

Q There could not very well have escaped being some profits to him?

A There might have been some.

Q You can not say that if these trades had not been transferred all of the margin certificates would have been wiped out, can you?

A Well, the whole account would have shown a loss. In my estimation the whole Prince transaction would have shown a loss instead of there being a dollar left. Quite a good smart loss at that.

Q That is just your opinion?

A That is my judgment, from my Board of Trade experience in like matters.

Q But whether or not the margins would have been wiped out depends upon how heavily the trades were margined. and what the loss was, would it not?

A It might have been.

Q If a contract showed a loss, a very small loss, and was

92 very heavily margined, it could not possibly wipe out the entire margin, could it?

A I do not recollect what the trades were. My recollection is that the margin certificates—there was quite a number of them, and they were quite well scattered around, and no very large amounts with any one person. That is my recollection.

Q You put up your own margins after the trades were transfered only to those members of the Board who asked for them?

A Those who asked for them. Our credit was good, and Prince's was not very good. But we put up something over ten thousand dollars on those trades. I have forgotten, ten or fifteen thousand dollars within two days. That shows you the excitable state of the market, and gives you some idea of what might have happened if you had closed Prince's transactions out on the market. Our credit was good, and we did not have to margin everything up like Prince had to margin it. If they called us that much what would they do with a trade for somebody else?

Q You did not substitute in every case your original certificates for those that Prince had had up?

A No, we paid no attention to what Prince had up. Nobody paid any attention to Prince's certificates. They only paid attention to Anderson. Anderson was the man they were looking to. They only paid attention to us.

Q And those members who held Prince's certificates 93 did not demand margins from you?

A Not necessarily. They might have had a trade with Prince there where he had a margin up, and that might have settled against a trade with us next day right off and that finished it. These Prince trades were immediately interwoven with our own and their identity was lost. They were settled against any trade that we may have open with anybody that would settle.

You understand, Mr. Terwilliger, the nature of settlement. I would settle with Mr. Tenney, and Mr. Tenney with the stenographer, and the stenographer with you, and when we get through there is a complete ring. That is what it is. We make one price and all collect up and down to that price. There is a settled price; that is all it amounts to. Instead of carrying it to delivery day we say I won't carry it, and it would go around, and we might each one of us

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of
P. have to pay a check for five or ten dollars on that property.

Q These settlements or rings are all reported to the Board of Trade Clearing House, are they not?

A No, sir.

Q What is reported there?

A The Board of Trade Clearing House only takes the amount of money, pay and collect.

Q After you have made rings of this sort there is a balance coming to or from you, then that goes through the clearing house, does it not?

94 A In this ring I have described, here there is a little bit of money, you collect from Mr. Tenney and I pay him; there is a little bit of money, and that is what goes to the clearing house. That is the ring, and that goes through the clearing house. It is only the difference in the money. The rings are nowhere outside of the books in our office.

Re-Cross Examination by Mr. Tenney.

Q Just one question, Mr. Anderson, about these new purchases and sales you made after the trades were transferred. As I understand you the amount of purchases that Prince had outstanding did not exactly offset the amount of his sales?

A That is right.

Q You did not make sales or purchases to correspond with each sale or purchase of his, but only enough so that his purchases offset his sales?

A That is correct. For example, he had 92,000 1000 bushel lots bought, and 93,000 sold. We would buy 1000 bushels, which would be ninety-three bought and ninety-three sold.

Whereupon an adjournment was taken until Wednesday, December 8, 1909, at 2 p. m.

96 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division.

Chicago Title & Trust Company,
Trustee in Bankruptcy of Earl H.
Prince
v.
Federal Trust & Savings Bank and
W. P. Anderson & Co. } No. 9743.

Proceedings had and evidence taken in the above entitled cause before the Honorable Charles B. Morrison, one of the Masters in Chancery of said Court, at his office, Room No. 933, First National Bank Building, in the City of Chicago, in said District, at the hour of ten o'clock A. M., on Friday, January 20, A. D. 1911, pursuant to an order of reference entered in said cause and due notice given.

Appearances:

Pringle, Northrup & Terwilliger, Solicitors for Chicago Title & Trust Company, Trustee.

Tenney, Coffeen, Harding & Sherman, Solicitors for Federal Trust & Savings Bank and W. P. Anderson & Co.

97 Present: Messrs. Terwilliger and Sherman.

Mr. Terwilliger: There was an agreement of counsel before Master Booth that the testimony of any witness taken in the case of Wolf v. American Trust & Savings Bank could be considered as having been taken in this cause and read into the evidence as far as it might be material. In pursuance of that stipulation I would like to call the Court's attention to the testimony of Mr. Wolf relating to a conversation between Mr. Charles C. Castle and Mr. Prince and himself at Prince's office on the 13th day of February, 1905, when they were conferring about Mr. Wolf's collateral, and the fact that it had been pledged by Prince to the bank.

Mr. Sherman: I do not know of any such stipulation. Of course, if it was entered into we will abide by it. In the

absence of such stipulation we shall object to the evidence as not the best evidence and as irrelevant and immaterial.

(Which said evidence is as follows:)

CHARLES C. WOLF, called as a witness on behalf of the complainant, having been first duly sworn, testified as follows:

Cross-Examination by Mr. Terwilliger.

Q You say in your conversation with Mr. Prince, in 98 the long distance conversation shortly before his failure, he said he was in trouble. Did he indicate the nature of his trouble?

A Yes.

Q Did he say he was in financial trouble?

A Well, it would indicate that way when he was calling on me for money.

Q You understood he was in financial trouble?

A Yes, sir.

Q At the conversation among Prince and Castle and Judson and yourself at Prince's office, do you recall asking Mr. Prince in the presence of the gentlemen named whether or not he was insolvent?

A I have no recollection.

Q Was the subject of solvency or insolvency discussed at that meeting?

A Not that I remember.

Q Was the question of his financial difficulties discussed?

A Well, I presume likely.

Q What was said about his financial troubles?

A Well, I don't know as I can answer that definitely except that they wanted me to take up that certificate of deposit for its face value, \$24,000.

Q Did you know that, or was it discussed at that meeting, that Prince's loan at the bank had been called?

A Well, possibly, I think likely it was.

Q You know it had been called, didn't you?

A Well, I think that matter was discussed.

99 Q Was the reason why his loan was called discussed?

A I could not answer that. I suppose it was on account of his financial condition.

Mr. Scott: I object to his supposing. If he was—

A Yes.

Q Was it discussed, the reason for calling the loan, was it discussed?

A Well, I could not say definitely as to that. I presume likely it was. I don't know.

Q Was his financial condition discussed, Prince's financial condition?

A Well, in an indefinite way I presume, yes.

Q Well, do you recall that it was?

A Yes, I think in an indefinite way it was discussed.

Q Do you recall what was said in that conversation?

A Well, yes, I think Mr. Castle told me and Prince also that he owed the bank a certain sum of money.

Q What sum of money?

A Well, I don't know. In the neighborhood—between twenty and thirty thousand.

Q Was the question or amount of his indebtedness to others discussed?

A Well, I don't know about that. I don't remember that.

Q Was anything said at that meeting about Prince's quitting, giving up business on the Board of Trade?

A I think so.

Q What was said in that regard?

100 A That he had to have help or he would have to quit.

Q And they wanted you to give that help?

A They wanted me to take up that certificate of deposit and help that much; if that was done I believe they would carry him along for the rest.

Q Didn't they say if you didn't do that he would have to bust?

A Well, I do not just remember the language. He would have to quit, probably.

Q He would have to quit?

A That would be a more gentlemanly way of expressing it.

Q Was there anything said about bankruptcy in case you did not take up the certificate of deposit?

A I do not remember; I think not.

Q Anything said about a failure in case you would not take up the certificate of deposit?

A Well, I don't know. Possibly there was. Might have been some such conversation.

Mr. Scott: Oh, Mr. Wolf, you must testify as to what conversation there was; not as to possibilities.

The Witness: Well, you see I do not just remember it.

Q How did they characterize what would follow upon your refusal to take up the certificate? What was the expression used as to what would follow upon that?

Mr. Scott: It does not appear from the evidence that any expression of that nature was used.

101 Q He said he would quit, or something of that sort?

Mr. Tenney: He said he would have to quit.

A That is, Prince would have to quit.

Q Is that the expression that was used?

A I could not say that. That was the purport.

Q Do you recall the language that was used?

A I do not. I cannot remember those things.

Q Was anything said about his transferring his trades on the Board of Trade?

A I do not remember that. Possibly so, but I do not remember.

Q Didn't this conversation take place on Monday the 13th day of February, which was celebrated as Lincoln's birthday, 1905?

A Well, I think there was a holiday in there somewhere or other. I am not dead sure.

Q Let me fix the date in this way: Prince went into bankruptcy on February 15, 1905, that was Wednesday. Were you not here on the preceding Monday? Wasn't—

A I was here a short time before that, but whether it was the preceding Monday—it was a holiday.

Q Wasn't it on a Monday?

A I don't remember that.

Q It was on a holiday, was it not?

A I think so. I think I recollect it was on a holiday.

Q The banks were closed?

A Oh, yes. The train was late.

Q It was not on a Sunday?

A No, I think not.

Q I guess that fixes it definitely enough. Mr. Castle
102 was present during all the talk at Prince's office on that day when you were here?

A Yes, sir, the afternoon or evening, along in the evening I got in.

Q Referring to the letter or telegram shown you by Mr. Tenney some time ago in which the words "Phillips robbers" were used, did you ever deal with George H. Phillips?

Mr. Scott: Objected to as immaterial.

Mr. Terwilliger: I think it is proper to go on and follow out that identification of that letter, that telegram, and try to show that he does know what those words meant.

Mr. Scott: He has already testified--

The Master: That is not proper cross-examination. It would simply be cross-examination upon Mr. Tenney's cross-examination; not upon the complainant's direct.

Mr. Terwilliger: That is all I think of now."

Mr. Terwilliger: I offer in evidence a stipulation of facts signed by solicitors for complainant and defendants, and ask that the same be marked Complainant's Exhibit 3.

(Which said stipulation was admitted in evidence and marked Complainant's Exhibit 3, January 20, 1911.)

In offering the stipulation of facts that I now hold in my hand I want the Court to understand that it contains statements inserted at the request of the defendants and 103 in proof of their defense as well as statements in proof of the complainant's case. There is a paragraph in the stipulation under which the parties reserve until the final hearing the right to object to any statement in the stipulation on the ground of irrelevancy or immateriality. It is the understanding and agreement of counsel for both parties that the complainant's reservation of the right of objection is as broad as that of the defendants, and that it is agreed that the stipulation shall be offered in evidence at this time as a part of complainant's case but that complainant is not, by reason of its being offered as a part of its case, precluded from objecting hereafter according to the reservation in this stipulation to any statements therein made.

I now offer in evidence the stipulation referred to and ask that it be marked Complainant's Exhibit 4.

(Which said stipulation was admitted in evidence and marked Complainant's Exhibit 4, Jan. 20, 1911.)

Complainant rests.

Defendants given until March 15, 1911, to close their proof.

Whereupon an adjournment was taken until Friday, January 27, 1911, at ten o'clock A. M.

104 Friday, January 27, 1911, 10 o'clock A. M.
Continued to Monday, February 6, 1911, 10 o'clock
A. M.

Monday, February 6, 1911, 10 o'clock A. M.
Continued to Thursday, March 16, 1911, 2 o'clock P. M.

Thursday, March 16, 1911, 2 o'clock P. M.
Met pursuant to agreement.
Present: Messrs. Terwillinger, Sherman.

Mr. Terwilliger: We filed a brief amendment to our bill to cover certain items that were in the evidence that were not contained in the original bill, and to that amendment the defendant has filed an answer incorporating its former answer as the answer to the amendment, and also a plea of the statute of limitations. I should like an agreement of all that the sufficiency of that plea be reserved until the final hearing.

Mr. Sherman: Are you going to file a replication of some kind.

Mr. Terwilliger: I filed nothing, but I did not consider the plea sufficient and thought that might be considered at the time the whole matter is heard.

Mr. Sherman: Why are you not filing a replication?

105 Mr. Terwilliger: Why cannot we agree that the replication as filed shall stand as the replication?

Mr. Sherman: We can if you so wish.

Mr. Terwilliger: So far as it affects the answer to the bill I am perfectly willing that should be done but of course that is not a replication to your plea.

Mr. Sherman: Then you want to argue your answer before it is at issue?

Mr. Terwilliger: No, but I consider it is at issue, don't you?

Mr. Sherman: No I do not think it is. We filed a pleading that you have not made an answer to.

Mr. Terwilliger: Then I will file a replication, and I will ask that the question as to the sufficiency of the plea be reserved.

Proofs on both sides are declared closed.

106 IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

Chicago Title & Trust Company,
Trustee of Earl H. Prince, Bank-
rupt. }
vs.
Federal Trust & Savings Bank and
W. P. Anderson & Company. }

AGREED STATEMENT OF FACTS.

It is hereby stipulated and agreed by and between the parties to this suit, by their respective solicitors, that upon the hearing of this cause, for the purposes of this cause only, the following may be taken as established as facts without further evidence thereof, to wit:

It is admitted that the allegations of the bill of complaint in paragraphs numbered I, II, III and V are true, and that on the 14th of February, 1905, the said Earl H. Prince was insolvent to an amount largely in excess of the amount claimed by the trustee in this cause, but this is not to be taken as admitting even prima facie that the defendants had knowledge or notice of insolvency.

It is further admitted that on the 14th day of February, 1905, said Earl H. Prince transferred to W. P. Anderson & Company all his time contracts, otherwise called open trades, on the Board of Trade of Chicago, and that said Prince and W. P. Anderson & Company signed the following request to the Secretary of the Board of Trade in accordance with its custom, to wit:

107 "E. H. Prince—Commission.

Chicago, Ill. 2/15/05

George F. Stone, Sec'ty:

Please notify members having trades with E. H. Prince to transfer all trades to W. P. Anderson & Co. E. H. Prince sheet will clear today as usual. Rings made for tomorrow will be closed by W. P. Anderson & Co.

(Signed) W. P. ANDERSON & Co.
E. H. PRINCE."

This transfer was duly made in accordance with the custom and rules of the Board, and Anderson & Company thereupon assumed and agreed to carry out said contracts with the various parties with whom they were made and was substituted in place of Prince. Thereupon the margin securities given by Prince upon said trades were released, Anderson & Company giving in place thereof its own securities and said trades were afterwards carried through to maturity and settled or settled before maturity in accordance with the rules of the Board between Anderson & Company and the other contracting parties, by what are known as rings, according to the rules of said Board of Trade, and by buying and selling in its own name enough grain and other commodities to correspond with or balance the amount of the open trades so transferred, and Anderson & Company paid to and received from the several members the respective amounts due to or from them on said rings or settlements through the clearing house of said Board of Trade. Said rings or settlements were made as a part of the other regular business of said W. P. Anderson & Company and involved numerous and intricate transactions, to discover which would require laborious and lengthy investigation and accounting on the part of W. P. Anderson & Company. It is, therefore, admitted that taking said open trades so transferred as a whole the condition of the market at the time of the

transfer was such that the aggregate sum of the amounts 108 due thereon to Earl H. Prince from members of said

Board of Trade, if he had then settled the trades, would have been greater than the aggregate sum of the amounts due thereon from said Earl H. Prince to others of said members of said Board of Trade; that among the open trades so transferred and settled were trades with those members of the Board of Trade named in the defendant Bank's answer as having held securities or margin certificates furnished by said Earl H. Prince; that the respective amounts of the margins which had been given by Prince to said last mentioned members of the Board of Trade on said open trades are correctly set up in defendant Bank's answer. On February 15th, 1905, the market was constantly changing. If the said trades with members holding these margin certificates had been closed at the opening of the Board on that day by the members holding them, there would have been due from them to Prince in the aggregate a balance of approximately one-third of the amount of the certificates after deducting therefrom the amounts that

would have been due to them from Prince. If the trades had been closed later in the day, the balance coming to Prince would have been considerably less.

At the time of said transfer the defendant Bank held indebtedness against Earl H. Prince, as stated in its answer, exceeding the amount of said securities or margin certificates.

It is understood and agreed that any of the parties to this suit may introduce any relevant, material or competent evidence not inconsistent with the facts above admitted.

WM. J. PRINGLE

EDWIN TERWILLIGER, JR.

Solicitors for Complainant.

TENNEY, COFFEEN, HARDING & WILKERSON

Solicitors for Defendants.

Feb. 9, 1907.

(on the back) In the United States District Court, For the Northern District of Illinois. Eastern Division. Chicago, Title & Trust Co. Trustee of Earl H. Prince, Bankrupt, vs. Federal Trust & Savings Bank and W. P. Anderson & Company. Agreed statement of facts.

109 Know All Men by These Presents, That Federal Trust & Savings Bank, Chicago, Illinois, as principal, and Thomas P. Phillips and Chas. B. Shedd, as sureties, are held and firmly bound unto the Board of Trade of the City of Chicago, a corporation of the State of Illinois, in the penal sum of Fifty Thousand Dollars, to be paid to said Board of Trade, or its successor or successors, for the use of any person or persons who may from time to time be concerned or interested; for which payment, well and truly to be made, the said Federal Trust & Savings doth bind itself and its successor or successors, and the said sureties do bind themselves, their heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with the corporate seal of said Federal Trust & Savings Bank and the seals of said sureties this fourteenth day of August, A. D. 1902.

Whereas, The Rules of the said Board of Trade provide for the making of deposits as margins, and as security or further security upon time contracts between members of said Board; and,

Whereas, Persons concerned in such contracts, either as purchasers or sellers, or their representatives respectively,

may hereafter, from time to time, desire to make such deposits with said Federal Trust & Savings Bank, and,

Whereas, The said Bank therefore desires to be authorized and qualified to act as a depository in such cases within the meaning of such Rules, as they now exist, or may hereafter be altered or amended.

Now, therefore, the Condition of the foregoing obligation is such that if the said Federal Trust & Savings Bank of Chicago shall faithfully perform its duty in the premises in respect to the proper disposal of all such securities or margins, in accordance with the Rules, Regulations and By-Laws of in said Board of Trade, then the said obligation shall be void, but otherwise the same shall remain in full force.

FEDERAL TRUST & SAVINGS BANK
by CHARLES S. CASTLE, (Seal)
Cashier

THOMAS P. PHILLIPPS (Seal)
CHAS. P. SHEDD (Seal)

Attest;

FEDERAL TRUST & SAVINGS BANK
By F. J. SHUART,
(Corporate Seal) *Secretary.*

COMP. EX. 3. JAN 20, 1911.

110 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company, Trustee of Earl H. Prince, Bankrupt.	}
<i>vs.</i>	
Federal Trust & Savings Bank and W. P. Anderson & Company.	

AGREED STATEMENT OF FACTS.

It is hereby stipulated and agreed by and between the parties to this suit, by their respective solicitors, that upon the hearing of this cause, for the purpose of this cause only, the

following may be taken as established as facts without further evidence thereof, to wit:

At the time of the transfer of the trades of Earl H. Prince to W. P. Anderson & Company, the said Earl H. Prince was indebted, as appears from his schedules in bankruptcy, in the sum of over \$100,000.00 to numerous other creditors beside said bank for balance due them for margins deposited with said Prince as a broker and for various other items of rent, merchandise, money lent, besides about \$1000.00 due for wages to various employes of said Prince, and the assets of the said Earl H. Prince as appears from his said schedules, aside from the amount sought to be recovered in this suit, were less than \$50000.00 in value.

But the defendants do not hereby admit that at said time they had any knowledge actual or constructive, of said financial condition of Earl H. Prince, or that the facts hereinabove set out are material to the issues in this cause, and the parties hereto reserve until final hearing all questions as to the materiality of said facts.

PRINGLE, NORTHRUP & TERWILLIGER
Solicitors for Complainant.
TENNEY, COFFEEN, HARDING & SHERMAN,
Solicitors for Defendants.

5/43/10

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COMP. EX. 4, JAN. 20, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Chicago Title & Trust Company Trustee of Earl H. Prince Bankrupt	} In Equity. No. 9743
vs.	
Federal Trust & Savings Bank and W. P. Anderson & Company.	

It is hereby agreed by and between the parties to this suit, by their respective solicitors, that upon hearing of this cause, for the purpose of this cause only, Charles S. Castle, if sworn as a witness, would testify as follows, to wit:

That at the times hereinafter mentioned, said Charles S. Castle was Vice President of the Federal Trust & Savings Bank; that the statement hereto attached and marked "Exhibit A," is a correct statement of the deposit and checking account of Earl H. Prince with said bank from the first day of February, 1905, to the date of the closing of said account; that on the 10th day of February, 1905, the said bank called the loans made by it to the said Prince, and credited on the said loans the sum of Three thousand and Ninety-five dollars (\$3095.00), then remaining to the credit of said Prince in his deposit and checking account, and charged the same to said account; later in the day on said February 10th, 1905, said bank paid a check of said Prince to the order of the manager of the Board of Trade Clearing House, in the amount of \$656.25, which left the account of said Prince overdrawn in

the amount of \$653.00; that thereafter checks drawn on 117 February 10th, 1905, and previous thereto by the said

Prince against said account were presented to said bank for payment and payment was refused, but the said bank did, on and after February 10th, 1905, pay certain salary checks of employes of said Prince, payroll checks, and checks to the manager of the Board of Trade Clearing House, in payment of said Prince's indebtedness to the said Clearing House, said checks being of the dates and amounts as follows:

Feb. 11, 1905	\$457.50
Feb. 11, 1905	417.60
Feb. 4, 1905	95.56
Feb. 7, 1905	102.50
Feb. 14, 1905	243.75
Feb. 10,	30.00
Feb. 10,	20.00
Feb. 10,	23.00
Feb. 10,	45.00
	37.00
	43.65
	31.00
	21.15
	20.00
	22.00
	20.00
	42.00
	25.00
	36.00

20.00
12.50
37.50
7.00
20.00
20.00

which said checks, said bank on the tenth day of February 1905, agreed with Prince it would pay if said Prince would thereafter make deposits of sufficient funds to cover same; that said Prince did after the close of business on Feb. 10th, 1905, and thereafter deposit in said bank, the following sums, on the dates set opposite said sums:

Feb. 10th, 1905 \$1450.00

Feb. 11th, 1905 310.00

which said deposits were entered in the books of said bank under date of February 14th, 1905

118 Feb. 14th, 1905 \$820.00

Feb. 14th, 1905 499.00

\$3079.00

that the total of said salary, payroll and clearing house checks paid by said bank amounted to \$1850.21; that said bank on and after February 10th, refused to pay other checks not payroll salary or clearing checks previously drawn against said bank by said Prince; that on the 14th day of February, 1905, there remained a balance to said Prince in said account of \$575.79, which said bank on said day applied on the indebtedness of said Prince to it and closed that account.

Said Prince had for several years prior to February 1905, had a deposit account with the defendant, the Federal Trust & Savings Bank, as his banker, and said defendant was also a creditor of said Prince upon his paper, which it discounted for him, the proceeds of said paper being passed to the credit of his deposit account against which he drew checks; and on February 14th, 1905, said Prince was largely indebted to said defendant upon notes which it had discounted for him. Said defendant from time to time issued to said Prince certificates on the following dates and for the following amounts in connection with trades which he had with the following named persons whose names are stated in said certificates:

September	15th, 1904,	\$300,	Peavey Grain Co.
"	19th, 1904,	300,	Peavey Grain Co.
"	23rd, 1904,	250.	Keith & Co.
October	17th, 1904,	250.	Peavy Grain Co.
January	10th, 1905,	500.	Pringle, Fitch & Rankin
January	20th, 1905,	250.	Peavey Grain Co.
"	31st, 1905,	250.	Finley Barrell & Co.
"	31st, 1905,	250.	Ware & Leland
"	31st, 1905,	250.	Ware & Leland
February	6, 1905,	300.	A. J. White & Co.
"	6, 1905,	250.	Walter Comstock
"	6, 1905,	300.	J. A. Edwards & Co.
"	7, 1905,	300.	Crichton & Co.
"	9, 1905,	250.	Pringle, Fitch & Rankin
"	9, 1905,	250.	C. H. Canby & Co.

119 Each of said certificates, except as to the names, dates, numbers and amounts, were in the following form:

Federal Trust and Savings Bank

Chicago No.

Deposited by E. H. Prince, \$.....

Dollars

As security on a contract or contracts between the depositor and, which amount is payable on the return of this certificate, or the duplicate of the same (one of which being paid, the other shall become void), duly endorsed by both of the above named parties, or on the order of the President of the Board of Trade of the City of Chicago, endorsed on either of the original or duplicate hereof, as provided by the rules of said Board of Trade under which the above named deposit has been made.

Original

Not negotiable or transferable

Cashier.

That to procure said certificates said Prince drew his check against his checking account, with said defendant, or deposited with it the requisite sum of money. Each of said certificates evidenced a liability of said defendant to said Prince for the amount stated in said certificate, payable to him unless required to be paid to the other parties named therein because of a default by said prince on the contract for which said certificate was held by the other party as security; that

AST
m
ts

a record of the issuance of said margin certificates and all other margin certificates was entered by said bank in a margin register and the totals of each days margin certificates issued was entered in the ledger of said bank in an account called "Margin Account," and the total of all unpaid margins appeared on the bank's ledger as one of the items constituting its total liability.

120 That on or about February 14th, 1905, said Prince transferred his outstanding trades on the Board to the defendant, W. P. Anderson & Company; that thereupon said Anderson & Company, in accordance with the custom of the board, assumed all of said trades and was duly substituted in the place of said Prince with the other parties thereto, and thereupon made its own arrangements with the other contracting parties with reference to securities and margins, and that thereupon said Prince was relieved from the obligation of said contracts, and said certificates were delivered to said defendant, Federal Trust & Savings Bank; that said Prince was then indebted to said defendant Bank in a sum far exceeding the amount of said certificates, but not exceeding \$37,000.00, and that thereupon said defendant bank credited the amount of said certificates upon the indebtedness which said Prince then owed to it.

It is stipulated and agreed that the foregoing statements shall be accepted as of the same force and effect on the hearing of this cause as if testified to by said Charles S. Castle, but the parties do not admit the materiality or relevancy of said statements, and hereby reserve until the final hearing all questions as to the materiality or relevancy of said statements.

It is further stipulated that all of the assets of the said Earl H. Prince, bankrupt, have been sold and converted into cash under the orders of the District Court of the United States for the Northern District of Illinois, and the said Trustee now has on hand a balance of \$1180.83, cash received for the sale of same.

The estate of Earl H. Prince, Bankrupt, is indebted to the said Trustee in the sum of \$24.41 for disbursements made by the said trustee in the administration of the said estate. No fees of trustee, referee, or attorneys have been paid by said trustee, nor have any claims or dividends been paid by the said trustee in said bankruptcy proceedings.

It is further stipulated that the defendant Federal

Trust & Savings Bank on or about Nov. 23, 1905 received the following communication:

Chicago, 11/22/05.

Federal Trust & Savings Bank,
205 La Salle St., City.

Gentlemen:—

In the matter of E. H. Prince, bankrupt, the evidence taken at the various hearings before Referee Wean, discloses the fact that after you had knowledge of the insolvency of Mr. Prince, he made deposits in your Bank largely in excess of his withdrawals, which you afterwards applied upon his indebtedness.

It was also shown that you received through W. G. Anderson about \$4,500, which had previously been held by your bank as margins to secure members of the Board of Trade to whom Prince was indebted on various trades.

The surplus of the deposits applied upon the bankrupt's indebtedness was unquestionably a preference, which the trustee in bankruptcy can recover. In our opinion, the \$4,500 was also a preference. We believe that these margins are considered in the nature of deposits in escrow, or pledges for the security of the creditors of Mr. Prince named in the certificates. Through the agency of Mr. Anderson, the creditors holding these securities were paid through the Board of Trade Clearing House with the balances that were due to Mr. Prince from other Board of Trade members, in this manner letting down the security. Had they not been paid by the application of balances due Prince from other members, they could have been realized upon the margin certificates.

We have decided to take the necessary action to recover these reference, but before taking any steps we desire to know if you care to adjust the matter out of court. We will appreciate your immediate answer.

Very truly yours,
PRINGLE, NORTHRUP & TERWILLIGER.

Said defendant did not after the receipt of said communication acknowledge any liability with reference to any of the matters therein contained nor make the adjustment referred to therein.

122 The parties do not hereby admit the materiality or relevancy of the facts stipulated to in the three preceed-

Complainant's Exhibit 4.

81

ing paragraphs, but reserve until the final hearing all questions as to their materiality or relevancy.

PRINGLE, NORTHRUP & TERWILLIGER,
Solicitors for Complainants.

TENNEY, COFFEEN, HARDING & SHERMAN,
Solicitors for Defendants.

Dated this 20th day of January, A. D. 1911.

123

Mr. E. H. Prince
106 Royal Ins. Bldg.,
Chicago.

In account with

Federal Trust & Savings Bank
Chicago.

For the Month of Feb. 1905.

No. Line	Date	Checks	Day	Total Checks	Description	Deposits
1	1	346.25	1	1729.67	Balance	1505.06
2		20.00			1	549.00
3		100.00	2	160.45		20.00
4		22.00			2	2448.75
5		1000.00	3	1958.58		560.00
6		10.00			3	2074.00
7		73.75	4	795.10	4	6804.30
8		157.67			6	818.30
9	2	5.00	6	7599.90	7	599.60
10		79.70			8	3460.60
11		25.75	7	1640.55		
12		50.00			9	1075.85
13	3	111.85	8	1709.96	14	1450.00
14		17.50				310.00
15		198.73	9	1322.00		820.00
16		50.00			10	499.00
17		147.50	10	3751.25		
18		66.25				
19		348.75	11	1073.16		
20		1000.00				
21		18.00	14	1352.84		
22	4	337.50				
23		417.60				
24		40.00				
25	6	1250.00				
26		346.25				
27		6003.65				
28	7	561.25				
29		1079.30				
30	8	765.05				
31		928.75				
32		16.16				
33	9	500.00				
34		22.00				
35		800.00				
36	10	3095.00 debit D. L.				
37	10	656.25				
				Total Credits		23093.46
				Total Debits		23093.46

	38	11	457.50
al	39		417.00
iv-	40		95.56
of	41		102.50
	42	14	243.75
	43		575.79 debit bal a/c
	44		30.00
	45		20.00
	46		23.00
	47		45.00
	48		37.00
	49		43.65
	50		31.00
	1	14	21.15
	2		20.00
	3		22.00
124	4		20.00
	5		42.50
	6		25.00
	7		30.00
	8		20.00
	9		12.50
	10		3.50
	11		(Portion
	12		obliterated here)
	13		20.00

Endorsed: In the District Court of the United States for the Northern District of Illinois Eastern Division Chicago Title & Trust Company, Trustee of Earl H. Prince, Bankrupt, vs. Federal Trust & Savings Bank and W. P. Anderson & Company. In Equity. Transcript of Evidence; Complainant's Exhibits 1, 2, 3, and 4; Objections to Master's Report. Filed May 24, 1911 T. C. MacMillan, Clerk.

125 And afterwards, to wit, on the 24th day of May, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Master's Report; same being in the words and figures following, to wit:

126 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division.

Chicago Title & Trust Company Trustee of Earl H. Prince, Bank- rupt,	} In Equity No. 9743.
vs. Federal Trust & Savings Bank and W. P. Anderson & Company.	

MASTER'S REPORT.

To the Honorable Kenesaw M. Landis, Judge of Said Court:

The undersigned, Charles B. Morrison, Master in Chancery of said Court, respectfully represents unto your Honor that the above entitled suit was heretofore referred to Hervey W. Booth then Master in Chancery of this Court. That it appears from the transcript of the testimony and proceedings had and taken before the said Master in Chancery Booth, that on the 10th day of December, 1907, the parties to the suit, by their respective attorneys, appeared before him and the taking of testimony on behalf of the complainant was on said day commenced and continued during the day, 127 and that on said day the further hearing before the said Master was adjourned, subject to be resumed on notice.

That afterwards, and on the 1st day of December, 1909, pursuant to notice, the parties again appeared before the said Master in Chancery Booth, and the taking of testimony was resumed, and at the close of said day the further hearing was adjourned until December 8th 1909.

That it does not appear from the said transcript that any further proceedings were had or taken before the said Master in Chancery Booth.

That afterwards, and on to wit, the 7th day of January, 1910, the said Hervey W. Booth died, not having completed the taking of said testimony.

That afterwards the undersigned was appointed Master in Chancery to succeed the said Hervey W. Booth, deceased, and on the 14th day of October, 1910, by an order of the Court, the said suit was referred to him as such Master in

Chancery to take the testimony therein and report the same to the Court, together with his conclusions of law and fact, and in said order of reference the Master was directed in making his findings to consider not only the testimony which should be introduced before him, but also the testimony that had been introduced before his said predecessor.

128 That by agreement, on the 20th day of January, 1911, the parties to the suit, by their respective attorneys, appeared before the undersigned, and the further taking of testimony therein was commenced and continued on said day, and on various days subsequent thereto until the 16th day of March, 1911, on which last mentioned day the taking of testimony on both sides was declared closed.

That before the said Master in Chancery Booth, as well as before the undersigned, at said hearings certain oral proofs and documentary exhibits were submitted and introduced in evidence, as shown by the transcript and report of said proofs and proceedings returned into Court herewith.

That the testimony so taken before said Master in Chancery Booth is shown on the first 48 pages of the transcript, and the testimony taken before the undersigned is shown on pages 49 to 58 inclusive.

That afterwards oral arguments were made by counsel for the respective parties, and the undersigned Master has duly considered said proofs and proceedings, and the oral arguments, and has reached the following findings and conclusions, to wit:

FINDINGS OF FACT.

The undersigned Master finds the facts to be:

1.

About the Parties to the Suit.

That on February 15th 1905, and for several years before that date, Earl H. Prince was a member of the Board of 129 Trade of Chicago, engaged in the buying and selling of commodities, subject to the rules of the Board of Trade in that regard.

That during the same period the defendant, the Federal Trust & Savings Bank, was engaged in the general banking business in the City of Chicago, and Earl H. Prince was trans-

acting his banking business with said bank, and had a general deposit and checking account therein.

That during the same period the defendant, W. P. Anderson & Company, through its officers who were members of said Board of Trade, was also engaged in the business of buying and selling grain and other commodities on said Board, on time contracts, and otherwise.

2.

The Rules of the Board of Trade.

That the rules of the Board of Trade are intended to, and do facilitate settlement between the members by obviating the necessity of adjusting each particular trade between the parties thereto, and by furnishing a way commonly known as ringing up trades, by which each member makes one settlement through the Board which covers all of his transactions.

That on time contracts, the rules provide that purchasers shall have the right to require of sellers, as security, a deposit of 10%, based upon the contract price of the property bought, and further security from time to time as the market advances, and that sellers shall also have the right to require, as security from buyers, a deposit of 10% on the contract price of the property sold, and in addition, any differences that may occur between the estimated value of the property and the price of sale.

The rules also provide that banks may be authorized to issue margin certificates to be used in such cases and become authorized depositories for securities on giving bonds for the proper disposal of deposits handled by them, and when such banks are so authorized, they are known as "Board of Trade Depositories," and the rules require that certificates must be issued by such banks in duplicate, and made non-transferable, for all deposits made with them. These certificates so issued must state by whom the deposits are made and for whose account they are held, and that the same are payable upon the return of the certificate, or the duplicate thereof duly endorsed by the parties to the contract, or on the order of the President of the Board of Trade. The rules prescribe the form in which the certificate shall be issued, and the memoranda thereof that shall be kept, and
131 all certificates when issued are required to be placed in the office of the Clearing House of the Board, and all

business pertaining to the issuance and use of said certificates are required to be carried on in accordance with the rules of the Board.

3.

About Prince's transactions with the Federal Trust & Savings Bank.

That the Federal Trust & Savings Bank was from August 20th, 1902, up to, and including the month of February, 1905, a Board of Trade Depository.

That on, and for several years prior to February 10th 1905, Earl H. Prince had a deposit and checking account with the Federal Trust & Savings Bank, and on said 10th day of February was largely indebted to the bank on demand notes and otherwise, and on that day the bank called the said loans and they were not paid, and thereupon the bank applied, as a payment upon the same, \$3,095.00 then on deposit in Prince's checking and deposit account in the bank, which left to the credit of Prince in that account only the sum of \$3.25. On the same day the bank agreed with Prince that if he would thereafter make deposits to cover the same it would pay certain salary and pay-roll checks of employes of Prince and checks issued to the Board of Trade Clearing House; that pursuant to said agreement the bank did pay such checks issued on the 4th, 7th, 10th, 11th and 14th 132 days of February, 1905, amounting to \$2,506.46, and the said Prince did deposit with the bank on February 10th after closing hours \$1,450.00, on February 11th, \$310.00, on February 14th he made two deposits, one for \$820.00 and the other for \$499.00, making a total of \$3,079.00. All of these items were entered on the books of the bank under date of February 14, 1905. It will be seen that the amount deposited under that arrangement exceeded the amount paid on checks in the sum of \$572.54. This amount, which with the \$3.25 remaining to the credit of Prince when the application of the \$3,095.00 was made on February 10th, left a balance due Prince of \$575.79, which balance the bank on February 14th applied on Prince's general indebtedness to the bank.

After the application and the arrangement of February 10th the bank paid a clearing house check of \$656.25, which on the close of business on that day left Prince's account overdrawn to the extent of \$653.00. This, however, was made

pursuant to said agreement and was more than covered by deposits made by Prince after the close of business on the same day.

The other checks drawn by Prince on February 10th, and prior thereto, not included in the said arrangement between him and the bank were presented to the bank for payment and payment thereof was refused.

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4.

The Margin Certificates; Prince's Trades, and how they were handled.

That on various days from September 15th 1904, to February 9th 1905 the Federal Trust & Savings Bank issued to Prince margin certificates to be used by him in this trades, and which were by him placed in the office of the Clearing House of said Board in accordance with the said rules of the Board of Trade, as follows:

September	15, 1904,	\$300.00,	Peavey Grain Co.
"	19, 1904,	300.00,	Peavey Grain Co.
"	23, 1904,	250.00,	Keith & Co.
October	17, 1904,	250.00,	Peavey Grain Co.
January	10, 1905,	500.00,	Pringle, Fitch & Rankin.
"	20, 1905,	250.00,	Peavey Grain Co.
"	31, 1905,	250.00,	Finley Barell & Co.
"	31, 1905,	250.00,	Ware & Leland.
"	31, 1905,	250.00,	Ware & Leland.
February	6, 1905,	300.00,	A. J. White & Co.
"	6, 1905,	250.00,	Walter Comstock.
"	6, 1905,	300.00,	J. A. Edwards & Co.
"	7, 1905,	300.00,	Crighton & Co.
"	9, 1905,	250.00,	Pringle, Fitch & Rankin.
"	9, 1905,	250.00,	C. H. Canby & Co.

Total amount \$4250.00

That to procure said certificates, Prince drew his check against his checking account with the Federal Trust & Savings Bank, or deposited with it the requisite sum of money. Each of said certificates evidenced a liability of the bank to Prince for the amount stated in the certificate payable to him, unless required to be paid to the other parties named therein, because of a default by Prince on the contract for which the certificate was held by the other party as security.

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That a record of the issuance of margin certificates was kept in the bank in a "margin register", and the total of each day's margin certificates issued was entered in the ledger of the bank in an account called the "Margin Account", and the total of all unpaid margins appeared on the bank's ledger as one of the items constituting its total liabilities.

5.

Transactions among Prince, the Federal Trust & Savings Bank, and Anderson & Company.

That on the 14th day of February, 1907, Charles S. Castle, who was then vice president of the Federal Trust & Savings Bank, and Earl H. Prince had a conference at the bank in reference to the financial affairs of the said Prince, and while together Mr. Castle telephoned to W. P. Anderson, who was then president and treasurer of the said W. P. Anderson & Company, a corporation, asking him to come to the bank, which he soon thereafter did, and Mr. Castle informed Mr. Anderson that Prince was in financial troubles; that he had quite a number of open trades, and asked Mr. Anderson's advice as to the best way to close them. Mr. Anderson suggested that Prince transfer them to some other dealer and close them up in that way. Prince asked Mr. Anderson if his company would take them, and he agreed that it would, 135 if after examination the trades showed a profit. Investigation was made by Mr. Anderson and he was satisfied with conditions, and on the same day, February 14th, or the day following, Prince transferred all of his open trades in accordance with the rules of the Board, and Anderson & Company assumed and agreed to carry out the contracts with the various parties with whom they were made.

That on the 15th day of February, 1905, the secretary of the Board of Trade, on the written request of Anderson & Company, notified members having trades with Prince to transfer them to Anderson & Company, and that Prince's sheet would clear on that day as usual, but that rings made for the following day would be closed by Anderson & Company. Anderson & Company was fully substituted in place of Prince and his trades were afterwards settled between Anderson & Company and the other parties according to the customs and rules of the Board. When Anderson & Com-

pany took over these trades it purchased or sold in its own name enough grain and other commodities to correspond with, or balance the amount of the open trades so transferred by Prince, and paid to, and received from the several members the respective amounts due to, or from them on settlements through the Clearing House of the Board. The settlements were made as a part of the other regular business of 136 Anderson & Company, and in all respects the same as if the trades had been originally made by that company.

That on the substitution of Anderson & Company for Prince on February 15th 1907, that company put up its own securities on all of Prince's trades, and thereby released the said certificates deposited by Prince to secure the same trades, and they were taken up by Anderson & Company, and with the possible exception of the certificate of C. H. Canby & Co. for \$250.00, were turned over to the Federal Trust & Savings Bank before the close of banking hours on that day. The certificate of C. H. Canby & Co. if not turned over to the bank before the close of banking hours, was turned over within a few minutes thereafter.

When the certificates were turned over to the Federal Trust & Savings Bank Prince was indebted to that bank in a sum far exceeding the amount of said certificates so returned to the bank, but not in a sum exceeding \$37000.00, and the Federal Trust & Savings Bank on the return of said certificates, which aggregated in amount the sum of \$4250.00, applied and credited the amount thereof on Prince's indebtedness to the bank.

That taking the said open trades so transferred as a whole, the condition of the market at the time of the transfer was such that the aggregate sum of the amounts due thereon 137 to Earl H. Prince from members of the Board of Trade, if he had then settled the trades, would have been greater than the aggregate sums of the amount then due thereon from Prince to others of said members of the Board; that among the open trades so transferred and settled were trades with the said members of the Board who held securities or margin certificates furnished by the said Prince.

That on February 15th 1905, the market was constantly changing. If the trades with the members holding Prince's margin certificates had been closed at the opening of the Board on that day by the members holding them, there would have been due from them to Prince in the aggregate a bal-

ance of approximately one-third of the amount of the certificates after deducting therefrom the amount that would have been due to them from Prince. If the trades had been closed later in the day, the balance coming to Prince would have been considerably less. However, if Prince had carried out all of these contracts, the profits which he would have made upon some of them would have been about balanced by the losses which he would have sustained on others.

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6.

Prince becomes a Bankrupt.

That on the 15th day of February, 1905, an involuntary petition in bankruptcy was filed against Prince in the District Court, and on the 30th day of March Prince was adjudged a bankrupt, and on the 18th day of May the complainant, the Chicago Title & Trust Company was duly elected by the creditors, and appointed by the Honorable Frank L. Wean, Referee in Bankruptcy as Trustee in bankruptcy of said Earl H. Prince. That the trustee so appointed qualified as such and is still acting as trustee of said bankrupt.

That at the time of the transfer of the said trades to Anderson & Company, Prince was indebted, as appears from his schedules in bankruptcy afterwards filed, in the sum of over \$100,000.00 to numerous other creditors besides the Federal Trust & Savings Bank for balances due them for margins deposited with said Prince as a broker, and otherwise, besides \$1000.00 due for labor to various employes of said Prince, and the assets, as appears from his schedules in bankruptcy, aside from the amount involved in this suit, were less than \$50,000.00 in value, and it now appears that all of the assets of said Prince have been sold and converted into cash under the orders of the District Court, and 139 that there is now in the hands of the trustee a balance of only \$1180.83 received from such sale. That no fees have been paid to the trustee, referee or attorneys, and no claims have been paid, nor have any dividends thereon been paid by the trustee.

That the plan adopted at the conference between Mr. Prince, Mr. Anderson and Mr. Castle was doubtless the best plan that could have been adopted to avoid serious loss to Prince, or to his creditors. The condition of the market was such at that time that had Anderson & Company not taken charge of

Prince's trades and carried them through a panic might have ensued on the Board, and the market so fluctuated that the amount of all of the margin certificates, and quite likely a considerable more, would have been lost to Prince and his creditors.

7.

The Federal Trust & Savings Bank on February 10th, and from that time on, had reasonable cause to believe that Prince was insolvent, and that payments thereafter made to the bank were intended as preferences.

In the preceding findings the Master has stated his conclusions as to the condition of the account between Prince and the Federal Trust & Savings Bank from February 10th to February 15th inclusive, and some of the principal facts in the order of their chronology. To justly determine the rights and liabilities of the parties under the bankruptcy law it is necessary to consider in a more comprehensive way the relations of the parties, the business in which they were engaged, and all of the facts and circumstances disclosed by the testimony which may throw light upon, or give color to, the transactions which took place during the five days preceding the filing of the petition in bankruptcy against Prince.

For several years prior to February 10, 1905, Prince did his banking business with the Federal Trust & Savings Bank. He not only had a checking and deposit account there, but the bank discounted his notes, and in other ways gave to him extensive credit. In 1902 the bank became a Board of Trade depository, gave its bond as required by the rules of the Board, and Prince, at least for some time prior to his failure, and presumably for several years before, had in the bank a margin account in which he deposited funds to perfect margin certificates issued by the bank to be used by him in his deals on the Board, so that the relations between Prince and the bank were of a close and confidential character, and the bank was in a better position than any other of Prince's creditors to know his financial condition.

141 On the 10th of February, Charles S. Castle, the vice-president of the bank, and Prince had a conference and the relations that had theretofore existed were terminated; practically all that Prince had on deposit in his general ac-

count on that day was applied on his indebtedness to the bank, regardless of the fact, which both Prince and Castle must have known, that checks previously drawn by Prince were outstanding and would afterwards be presented to the bank for payment. The testimony does not show how many, or in what amount checks had been previously issued by Prince, but it does show that checks were afterwards presented to the bank and payment was refused. Prince and Castle were both experienced business men and both knew that if payment of his checks was refused by the bank, a day of reckoning was not far off.

The relations between Prince, the bank and the Board of Trade were close. Under the rules of the Board one or more of the executive officers of a bank which becomes a Board of Trade Depository must be members of the Board.

The arrangement which was entered into at the bank on the 10th between Prince and Castle, by which it was agreed that Clearing House and pay roll checks should be paid by the bank, and that Prince should deposit sufficiently to cover these payments was calculated to keep Prince going and 142 to protect the Clearing House, as well as the bank, but no provision whatever was made for other creditors. The reason for this arrangement is apparent and it was made primarily in the interest of the bank. Had Prince failed to take care of his Clearing House and pay roll liabilities a failure would have immediately followed, and had he failed at that time without transferring his trades so that they could be carried on to completion in the regular way the result in all probability would have been that the amount of his deposits, \$4250.00 in the margin account would have been wiped out and the bank would have been compelled to pay out this money which it wanted to apply and afterwards did apply on Prince's indebtedness.

The 10th of February was on Friday. Prince was at the bank and in conference with Castle on every day from February 10th to February 15th. Monday, the 13th, was Lincoln's birthday, so that the bank was closed on Sunday, the 12th, and Monday, the 13th, but this matter was of such moment that a conference was held on the afternoon or evening of the 13th between Mr. Castle, Mr. Prince and Mr. C. C. Wolf of Parkersburg, Iowa. Wolf had been dealing on the Board through Prince for several years, and in the course of his dealings had turned over to Prince a certificate of deposit

issued by the Parkersburg bank, of which Wolf was then
143 the Cashier, for \$24,000, besides certain certificates of the
capital stock of the same bank. Prince telephoned, the
testimony does not show at what time, to Wolf to come to
Chicago, that he, Prince was in financial trouble. Wolf's
train was delayed and he did not reach Chicago until towards
evening of the 12th. He went to Prince's office and there
met Prince and Castle. Prince's financial difficulties were
talked over and Wolf was informed that Prince was indebted
to the Federal Trust & Savings Bank to the extent as Wolf
understood of twenty or thirty thousand dollars, that his
bank loans had been called and that Prince must have help or
quit business. Prince and Castle wanted Wolf to take up
the certificate of deposit at its face value, \$24,000, and help
that much, and Wolf was under the impression that if that
was done that the bank would carry him along for the rest.
Wolf for some reason failed to take up the certificate. Had
Wolf taken up the certificate of deposit which the bank then
held the bank would have applied it on Prince's indebted-
ness and might have carried him along, but subsequent de-
velopments show that Prince would still have been insolvent.

No further effort seems to have been made by Prince or
Castle to secure funds to continue Prince in business, and
on the following day, the 14th, he transferred his trades
144 to Anderson & Company, and on the 15th notice was
posted up on the Board of the transfer of Prince's trades,
and on the same day Anderson & Company put up its own
securities and took up Prince's margin certificates, procured
the endorsement of the other parties to the trades upon them
and returned them to the bank, and the bank applied them
upon Prince's general indebtedness, and on the same day an
involuntary petition in bankruptcy was filed against Prince,
as has already been stated in this report. The testimony
does not show whether the certificates were turned over to
the bank before or after the filing of the petition but as both
events occurred on the same day they may be regarded as
simultaneous.

Conclusions.

On February 10th, 1905, Prince was insolvent and the bank
knew it. Prince then had \$3098.25 standing to his credit in
his checking account at the bank. He also had a certificate
of deposit for \$24,000 issued to C. C. Wolf by the State

Exchange Bank of Parkersburg, Iowa, which was then up with the Federal Trust & Savings Bank as collateral. He also had other assets, which might be termed quick assets, the nature of which is not disclosed, upon which he could and did within the next few days realize \$3079.00. He also had on special deposit in the Federal Trust & Savings Bank \$4,145 250.00 placed there by him to protect his outstanding margin certificates, and at the same time he was so indebted to the bank that had all of these assets been applied upon his indebtedness there would still have been a balance due to the bank.

On the same day Mr. Castle, the Vice President of the Federal Trust & Savings Bank, and Mr. Prince, the insolvent, undertook to so shape and control Prince's affairs and business that all of these moneys might be acquired by the bank and applied on Prince's indebtedness, and this, too, with every reason to believe that bankruptcy would soon overtake Prince. From February 10th on until the involuntary petition was filed against Prince, Prince and Castle operated together to bring about this result and this is shown by what they did. On February 10th they applied \$3,095.00 of Prince's balance on his indebtedness and entered into an arrangement by which pay roll and clearing house checks should be paid by the bank, and these payments covered by deposits to be made by Prince. This arrangement they carried out between February 10th and 14th. The bank paid such checks to the amount of \$2,506.46 and Prince deposited to the amount of \$3,079.00, leaving in the bank's hands \$572.54, which together with the \$3.25 remaining in the bank amounted to \$575.79, was on February 14th applied on Prince's indebtedness to 146 the bank. On the 13th Prince and Castle had an interview with C. C. Wolf, in which they tried to induce him to pay the face amount of the certificate of deposit, which he refused to do. Had he complied with their wishes this amount would doubtless have been applied on Prince's indebtedness, as the bank held it as collateral. On the 14th of February Castle and Prince induced Anderson & Co. to take over Prince's trades, the bank agreeing to take care of some costs and expenses which it was thought might be, and which were in fact incurred. On the 15th of February Anderson & Co., pursuant to the arrangement, did take over Prince's trades in such a way as to release the margin certificates put up by him. These certificates were on the same

day endorsed by Prince and by the other parties to his deals, and returned to the bank and the bank applied the amount which they represented and which was then on deposit in the bank on Prince's indebtedness to the bank.

The conduct of Prince's affairs for the five days preceding the filing of the petition against him is of such a character as to exclude every other conclusion except that it was the intention of both Prince and Castle to reduce Prince's indebtedness to the bank as much as possible, by applying thereon all of his available assets and by so disposing of his business and open trades on the Board as to realize the greatest possible amount for the bank to the exclusion of his other creditors.

The transfer of the \$75.79, and the \$4,200.00 to the bank were made with knowledge on the part of the bank that Prince was insolvent, and with a view to use these amounts as set-offs against Prince's indebtedness to the bank.

8.

The Trustee in Bankruptcy lays Claim to the Moneys applied by the Bank on Prince's indebtedness.

That on November 25th, 1905, the Chicago Title & Trust Co., by its attorneys, wrote a letter to the Federal Trust & Savings Bank, asserting its right as trustee of Prince, bankrupt, to the amounts applied by the bank on Prince's indebtedness during the few days before the filing of the petition in bankruptcy against him.

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Findings of Law.

I find the law of the case to be that

I.

This is a suit brought by the Chicago Title & Trust Co., Trustee in bankruptcy of Earl H. Prince against the American Trust & Savings Bank, the successor of the Federal Trust & Savings Bank, to recover moneys placed in the bank by Prince which the Trustee claims were transferred or paid to the bank in such a way and under such circumstances as to make them preferential payments within the meaning of the Bankruptcy Law.

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The complainant relies upon section 60a and b, as amended, for its right to recover and its authority to prosecute this suit, which provide that:

(Sec. 60a) "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of * * * such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

(Sec. 60b) If a bankrupt shall have given a preference and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. * * *

149 The defendant, the American Trust & Savings Bank, claims that the application of the moneys on Prince's indebtedness to the bank was not preferential and was fully authorized by section 68a of the Bankruptcy Act, which provides that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set-off against the other, and the balance only shall be allowed or paid."

II.

The application of \$3,095.00, the balance, or practically so, standing to Prince's credit in the bank on February 10th, was not a preferential payment. The bank had the legal right to make the application under section 68a of the Bankruptcy Act, notwithstanding the fact that at the time the bank knew that Prince was insolvent, *Bank v. Massey*, 192 U. S. 138.

The application of subsequent deposits sufficient to cover the \$653.00 over-draft which existed at the close of business on February 10th, mentioned on page 7 of this report did not amount to a preferential payment, *Tomlinson & Bank*, 145 150 Fed. 824. The over-draft arose out of the special arrangements made on that day and in contemplation of deposits to be made under the same, and it is quite clear that the bank did not intend to extend further credit to Prince, and it gained nothing whatever by the transaction.

III.

The application on February 14th of the \$575.79, explained on page 7, and also on page 20, of this report, on Prince's indebtedness to the bank gave the bank a preference over other creditors which it was not entitled to have. The dealings between Prince and the bank, which resulted in this balance were carried on pursuant to special arrangements and must be viewed in all respects as if no previous relations had existed between them. Prince was insolvent at the time and the bank knew it. It was impossible for Prince and the bank to enter into or carry out any agreement or arrangement which would result in the payment of any part of Prince's general indebtedness to the bank to the exclusion of other creditors without violating the law, and whether the application was consented to by Prince or not, it was not authorized by the Bankruptcy Act and amounted to a preferential payment within the meaning of the act of such a character that the trustee has the right in this suit on that account to recover that amount.

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IV.

The application on February 15th of the \$4,250.00 before then deposited with the Federal Trust & Savings Bank by Prince to protect margin certificates issued to him by the bank was a preferential payment or transfer as defined in section 60a and b of the Bankruptcy Act, and the trustee has the right to recover that amount on that account in this suit. The facts upon which this finding of law is based will be found in division 4, page 8, division 5, page 9, and under "Conclusions" commencing on page 19 of this report.

The money deposited by Prince to obtain these certificates was deposited for a special purpose, that is, to protect whoever became entitled thereto on the return of the certificates. The money was not deposited in Prince's general account, he had none, it was not subject to check and could not be paid out to any one except on the return of the certificates bearing the endorsement of Prince and the other parties to the deals.

Counsel on both sides made arguments and presented authorities on the question as to whether these deposits were general or special, and on other questions pertaining to the relations that existed between Prince and the bank in reference to them. It will serve no useful purpose to determine these questions. All will agree that these

moneys were not deposited in any general checking and deposit account, and that after deposit they could not be withdrawn by Prince or by any one else until the certificates were returned, and that Prince did not become entitled to draw these moneys or use them, or make any application of them whatever until February 15th, when the certificates were returned to the bank bearing the proper endorsements, and that Prince then was entitled to the money which they represented.

It is contended by counsel that the bank had the right under section 68a, already set out herein, to apply the \$4,250.00, and that *Bank v. Massey*, 192 U. S. 138 sustains their contention. The facts in that case clearly distinguish it from the case at bar. The court held that the bank had a right to apply the balance due one of its depositors on his general indebtedness to the bank although the bank had received deposits from him and permitted him to check against his account after it knew of his insolvency. In a general checking and deposit account there are mutual credits and mutual debits, every deposit carries with it a corresponding credit. The case lays down no new rule of law. It applied the general law of set-off as expressed in section 68a and the rule ordinarily applied 153 in cases where there are mutual accounts between the parties, and it is well settled that unless there are mutual credits and debits arising out of a general course of business the allowance of a set-off or counter claim which results in giving a preference to one creditor over others, is within the inhibition of the Bankruptcy Act. In *re Lynden Mercantile Co.*, 156 Fed. 713, *Irish v. Citizens, etc.*, 163 Fed. 888.

The set-off section (68) of the Bankruptcy Act is divided into two paragraphs, a and b. So far this case has been considered under paragraph a, which is materially qualified by paragraph b, which reads as follows:

"A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate, or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

The facts as found under division 7, page 14, and conclusions on page 19 of this report bring this case clearly within section 68b. The return of the margin certificates and the

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consequent release of the money which they represented was accomplished by the combined efforts of Prince and Castle. The inevitable result of their efforts was to bring about a condition which would enable them to apply the money on Prince's indebtedness, and the law will conclusively impute to them the intention to bring about the result necessarily arising from what they did. *Wilson v. City Bank*, 17 Wall.

473. The facts of this case bring it within the rule laid down in the case of *Western Tie Company vs. Brown*, 196 U. S. 502. See also *In re White* 177 Fed. 194, *In re Lynden Mercantile Co.*, 156 Fed. 713.

155 Counsel for the bank contends that Section 68a is not applicable to this case, that it only applies to a case where a debtor of a bank acquires the set-off, and the strict wording of the section supports this contention. I do not believe that so strict a construction is warranted. If it should prevail the whole object of the act would be defeated in many cases. The Bankruptcy Act is designed to prevent preferences in whatever form they may appear and to insure equality among all the creditors in the distribution of the bankrupt's estate. A creditor when he acquires money belonging to a bankrupt becomes a debtor, and is both debtor and creditor at the same time. Can it make any difference which is created first, the debit or the credit? The Court in *Brown vs. Standard Tie Co.*, supra, applied this section to a case on principle the same as this. Whatever may be said as to the application of this particular section the facts of this case make it clear that Prince and the bank so shaped Prince's affairs that the bank was enabled to obtain a payment out of Prince's property of \$4,250.00, in violation of the rights of other creditors. Such a transaction is within the condemnation of the different sections of the law relating to preferences and contrary to the wording and intent of the Bankruptcy Act.

I find and report that the complainant, the Chicago Title & Trust Co., is entitled to a decree against the Federal Trust & Savings Bank, defendant, for the payment of \$4,825.79, with interest thereon from Nov. 25th, 1905, the date of the written notification mentioned on page 22 of this report. On the question of interest see *Irish vs. Citizens Trust Co.*, 163 Fed. 880, 892; *Keady vs. White*, 168 Ill. 76-83; *A. T. S. F. R. Co. vs. C. & W. I. R. Co.*, 54 Ill. App. 407; *Deimel vs. Brown*, 136 Ill. 586; *Steen vs. Hoogland*, 50 Ill. 377; *Chicago vs. Mutual Ins. Co.* 218 Ill. 44.

It was agreed by counsel on the hearing that all questions as to the jurisdiction of the court are waived.

157 **Objections.**

The undersigned Master further respectfully reported that on the 27th day of April A. D. 1911, he caused a notice in writing, together with a copy of his draft report, to be served upon counsel representing both sides in the case notifying them that objections might be filed thereto on or before the 2nd day of May, 1911, and that any objections filed would come on to be heard before the Master on said last mentioned day; that within said time objections were filed on behalf of the defendant, the Federal Trust & Savings Bank, numbered 1 to 20 both inclusive; no objections were filed on behalf of the complainant.

That on the hearing of the said objections, by agreement, counsel on both sides were granted further time in which to present authorities on the questions involved. That afterwards additional briefs were filed by counsel for both parties to the suit, and the Master has added to his findings of law the last three paragraphs thereof. That afterwards, and on the 16th day of May, the undersigned served written notice upon counsel for the complainant and for the defendants, and at the same time delivered to each of them a copy of that portion of his report which was added by him as aforesaid, notifying them that objections to the report as completed might be made at any time on or before May 19, 1911, and that such additional objections, if any should be filed, would come on to be heard before the Master on said last mentioned day. That during said time additional objections were filed, numbered 1 and 2. Copies of all objections filed as aforesaid are hereto attached and made a part of this report. The undersigned Master has considered said objections and his report, and overruled all of said objections, except additional objection number two, and this objection is sustained in part and overruled in part; that part of the objection which calls attention to the fact that the Master made no finding as to the defendant's plea of the statute of limitations is sustained and the rest of the objections is overruled.

The undersigned Master further reports that in the original bill no claim was made on account of the \$575.79 mentioned on pages 6 and 7 of this report, but in an amendment to the bill filed January 26, 1811, claim was made on account of this item. The amendment to the bill was filed more than five

years after the appointment of the Trustee. The defendant in its answer to the amended bill set up the statute of limitations of the State of Illinois and now contends that it is a bar to this suit. As to that contention I have to report that 158 the bankruptcy law suspends state limitations laws, unless the cause of action is barred when the Trustee is appointed, and the Trustee may bring suit at any time within two years after the estate has been closed. The claim set up in the amended bill is not barred as the estate is still open. Section 11d, Bankruptcy Law; *Sheldon v. Parker*, 11 A. B. R. 152-168, *Remington on Bankruptcy*, vol. 1, sec. 1789-1891 and 1892; *Collier on Bankruptcy* page 153 (6th ed); *Loveland on Bankruptcy* (2d ed.) 561, (3d ed.) 431.

Respectfully submitted,

CHARLES B. MORRISON,

*Master in Chancery of the Circuit Court
of the United States, Northern District
of Illinois.*

The Master herewith returns into Court and files with the Clerk the transcript of the testimony taken before him and before his predecessor, Master in Chancery Booth, consisting of 58 pages, the objections filed to said report, and Complainant's exhibits 1, 2, 3 and 4, which were all of the exhibits introduced in evidence in this case.

It was agreed by the parties to the suit that \$200.00 was a reasonable fee for the Master and for the reporter who transcribed the testimony taken before Master Morrison and who prepared this report. The Complainant paid one-half of this sum and the defendant paid one-half of it.

Respectfully submitted,

C. B. MORRISON,
Master.

159 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Title & Trust Co.

*vs.*Federal Trust & Savings Bank and
W. P. Anderson & Co. }

Objections taken by Defendant Federal Trust & Savings Bank to the Report of the Master in Chancery to whom this cause stands referred.

1. In that the Master has found that the application of the proceeds of \$4250 of margin certificates constitutes a preferential payment, whereas he should have found that the indebtedness represented by these certificates was incurred by the bank before it knew of Prince's insolvency, and is a debt against which Prince's indebtedness to the bank can be set off.

2. For that the said Master found (p. 22) that there was a transfer of the margin certificates (amounting to \$4250.) to the Federal Trust & Savings Bank with a view to use this amount as a set-off against E. H. Prince's indebtedness to said bank, whereas there is no evidence any one ever transferred said margin certificates to said bank.

3. For that the said Master has found (p. 23) that the deposit of \$575.79 constitutes a preferential payment, whereas he should have found that it does not constitute a payment at all, but a claim against which the Bank's claim against Prince can be set off.

4. For that the said Master found (p. 21-22) that there was a transfer of the item of \$575.79 made to the Federal Trust & Savings Bank with intent to use this amount as a set-off against Prince's indebtedness to the bank. Whereas the Master should have found first, that there was no intention on Prince's part to prefer the Bank to the extent of \$575.79, nor any other amount, nor reasonable ground for belief on the part of the Bank that a preference was intended, and second, that said amount was deposited with the bank with the intention that the bank should use the same, not as a set off, but

for the purpose of paying an unknown amount of checks.

160 5. For that the said Master found (p. 21) that during the five days preceding the filing of the petition in bankruptcy against E. H. Prince it was the intention of E. H. Prince and the Federal Trust & Savings Bank to apply all of Prince's available assets to his indebtedness to said bank, and to so dispose of Prince's business and open trades as to realize the greatest possible amount for said bank to the entire exclusion of all other creditors of said E. H. Prince; whereas the Master should have found that it was the intention of Prince and the Bank to protect Prince's creditors and those dealing on the Board of Trade.

6. For that the said Master found (p. 20) that Mr. Castle, Vice President of the Federal Trust & Savings Bank, on February 10, and the five next following, undertook to shape the affairs of E. H. Prince so that all of said E. H. Prince's assets might be acquired by the Federal Trust & Savings Bank, with knowledge during all of this time that the said Prince would soon be bankrupt; whereas the evidence shows that the plan adopted was adopted at the suggestion of Anderson & Co., to make the loss as small as possible and save for the creditors the greatest amount of assets.

7. For that the Master has found (p. 17) that the arrangement made by the Bank and Prince for the honoring of certain checks and not others, was made primarily in the interest of the Bank; whereas the Master should have found that such arrangements were made primarily for the benefit of Prince and his creditors generally and with a view to giving Prince a chance to meet his obligation—not for the purpose of giving the Bank a chance to get the margin certificates.

8. For that the Master has found (p. 16) that on February 10, 1905, the relations that had theretofore existed between the Bank and Prince were terminated. Whereas the Master should have found that the relations of bank and customer remained unchanged except in one particular, i. e. that not all but a portion of Prince's checks should be honored by the Bank.

9. For that the Master has found (p. 24) that Prince had no general account with the bank. Whereas he should have found that at all times he did have such an account.

10. For that the Master has found that the return of the margin certificates was accomplished by the combined efforts of Prince and Castle. Whereas he should have found that

they were surrendered as the result of the advice given by Anderson & Co. and not otherwise.

11. For that the said Master found (p. 21) that on 161 February 14, 1905, E. H. Prince and Mr. Castle induced the defendant Anderson & Co. to take over E. H. Prince's trades so as to release the margin certificates involved in the controversy. Whereas the Master should have found; first, that Mr. Castle did not induce Anderson & Co. to take over Prince's trades, but Anderson & Co. advised doing so, and second, that Anderson & Co. took over such trades so as to prevent heavy losses to all of Prince's creditors and perhaps a panic on the Board of Trade.

12. For that the finding of said Master on p. 17 of his report assumes a scheme planned by Castle on February 10 to force Prince to turn over his trades so the bank could get the margin certificates; whereas the evidence shows the turning over of the trades to Anderson & Co. was not considered until Anderson & Co. advised it, February 14, 1905.

13. For that the said Master found (p. 15) that the Bank was in a better position than any other of Prince's creditors to know his financial condition; whereas there is no evidence in the record as to Prince's relations with any other of his creditors.

14. For that the said Master found (p. 17) that Prince was at the Bank and in conference with Castle on every day from February 10 to February 15th; whereas there is no competent evidence of any conference except on February 10th and February 14th.

15. For that the said Master found (p. 20) that on February 10th E. H. Prince and Mr. Castle applied \$3095.00 standing to Prince's credit in his checking account with said bank, on E. H. Prince's indebtedness to said bank. Whereas the evidence shows the application was made by the Bank alone.

16. For that the Master held (p. 26) that this case comes within Sec. 68b of the Bankruptcy Act, whereas Sec. 68b has no application to the case but applies only to a creditor securing a set-off against money due the insolvent from said creditor.

17. For that the Master held (p. 24, 25) as a matter of law that Sec. 68a of the Bankruptcy Act applies only in cases where the amount against which the set-off is claimed is in a general checking account, whereas all that is required is that there be a debt due the insolvent from the creditor.

18. For that the said Master finds (p. 21) that E. H. Prince endorsed the margin certificates involved in this controversy on February 15, 1905; whereas there is no evidence in the record that said margin certificates were ever endorsed by E. H. Prince. FD
2

162 19. For that said Master has considered the testimony of Charles C. Wolf and has made numerous findings of fact based entirely on such testimony (pp. 17-18-19, 21) which was taken in the case of Wolf vs. Federal Trust & Savings Bank and read into this record against the objection of the defendant; whereas all of said testimony is incompetent.

20. For that the said Master found (p. 19) that the Federal Trust & Savings Bank had knowledge, of the insolvency of E. H. Prince on February 10, 1905; whereas the evidence does not establish such fact.

TENNEY, COFFEEN, HARDING & SHERMAN,
Solicitors for Federal T. & S. Bk.

IN THE DISTRICT COURT OF THE UNITED STATES FD
2

For the Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company,	}	No. 9743.
<i>vs.</i>		
Federal Trust & Savings Bank and W.		
P. Anderson & Co.		

Additional Objections taken by the Defendant Federal Trust & Savings Bank to the report of the Master in Chancery to whom this case stands referred.

1. In that the Master has found that interest is due complainant on the sum of \$4825.79 from Nov. 25, 1905; whereas complainant is not entitled to such interest.

2. For that the said Master has found that there was a preference made to this defendant (p. 21-22) of an item of \$575.79 claimed by the complainant in the amendment to his bill and made no finding as to defendant's plea of the Statute of Limitations filed to said amendment; whereas said Master

should have found that complainant's right to this item was barred by the Statute of Limitations.

TENNEY, COFFEEN, HARDING & SHERMAN,
Solicitors for Defendant.

163 Endorsed: In the District Court of the United States for the Northern District of Illinois Eastern Division Chicago Title & Trust Company, Trustee of Earl H. Prince, Bankrupt, vs. Federal Trust & Savings Bank and W. P. Anderson & Company. Master's Report. Filed May 24, 1911 T. C. MacMillan, Clerk.

111 IN THE DISTRICT COURT OF THE UNITED STATES
 For the Northern District of Illinois
 Eastern Division.

Chicago Title & Trust Co.	}	No. 9743.
<i>vs.</i>		
Federal Trust & Savings Bank and		
W. P. Anderson & Co.		

Objections Taken by Defendant Federal Trust & Savings Bank to the Report of the Master in Chancery to Whom This Cause Stands Referred.

1. In that the Master has found that the application of the proceeds of \$4250 of margin certificates constitutes a preferential payment, whereas he should have found that the indebtedness represented by these certificates was incurred by the bank before it knew of Prince's insolvency, and is a debt against which Prince's indebtedness to the bank can be set off.

2. For that the said Master found (p. 22) that there was a transfer of the margin certificates (amounting to \$4250) to the Federal Trust & Savings Bank with a view to use this amount as a set-off against E. H. Prince's indebtedness to said bank, whereas there is no evidence any one ever transferred said margin certificates to said bank.

3. For that the said Master has found (p. 23) that the deposit of \$575.79 constitutes a preferential payment, whereas he should have found that it does not constitute a payment, at all, but a claim against which the Bank's claim against Prince can be set off.

4. For that the said Master found (p. 21-22) that there was a transfer of the item of \$575.79 made to the Federal Trust & Savings Bank with intent to use this amount as a set-off against Prince's indebtedness to the bank. Whereas the Master should have found first, that there was no intention of Prince's part to prefer the Bank to the extent of \$575.79, nor any other amount, nor reasonable ground for belief on the part of the Bank that a preference was intended, and second, that said amount was deposited with the bank with the intention that the bank should use the same, not as a set off, but for the purpose of paying an unknown amount of checks.

112 5. For that the said Master found (p. 21) that during the five days preceding the filing of the petition in bankruptcy against E. H. Prince it was the intention of E. H. Prince and the Federal Trust & Savings Bank to apply all of Prince's available assets to his indebtedness to said bank, and to so dispose of Prince's business and open trades as to realize the greatest possible amount for said bank to the entire exclusion of all other creditors of said E. H. Prince; where as the Master should have found that it was the intention of Prince and the Bank to protect Prince's creditors and those dealing on the Board of Trade.

6. For that the said Master found (p. 20) that Mr. Castle, Vice President of the Federal Trust & Savings Bank, on February 10, and the five days next following, undertook to shape the affairs of E. H. Prince so that all of said E. H. Prince's assets might be acquired by the Federal Trust & Savings Bank, with knowledge during all of this time that the said Prince would soon be bankrupt; whereas the evidence shows that the plan adopted was adopted at the suggestion of Anderson & Co. to make the loss as small as possible and save for the creditors the greatest amount of assets.

7. For that the Master has found (p. 17) that the arrangement made by the Bank and Prince for the honoring of certain checks and not others, was made primarily in the interest of the Bank; whereas the Master should have found that such arrangements were made primarily for the benefit of Prince and his creditors generally and with a view to giving Prince a chance to meet his obligations—not for the purpose of giving the Bank a chance to get the margin certificates.

8. For that the Master has found (p. 16) that on February 10, 1905 the relations that had theretofore existed between the Bank and Prince were terminated. Whereas the Master should have found that the relations of bank and customer re-

mained unchanged except in one particular, i. e. that not
113 all but a portion of Prince's checks should be honored by
the Bank.

9. For that the Master has found (p. 24) that Prince had
no general account with the Bank. Whereas he should have
found that at all times he did have such an account.

10. For that the Master has found that the return of the
margin certificates was accomplished by the combined efforts
of Prince and Castle. Whereas he should have found that
they were surrendered as the result of the advice given by An-
derson & Co. and not otherwise.

11. For that the said Master found (p. 21) that on Febru-
ary 14, 1905 E. H. Prince and Mr. Castle induced the defend-
ant Anderson & Co. to take E. H. Prince's trades so as to re-
lease the margin certificates involved in this controversy.
Whereas the Master should have found: first that Mr. Castle
did not induce Anderson & Co. to take over Prince's trades,
but Anderson & Co. advised doing so, and second, that Ander-
son & Co. took over such trades so as to prevent heavy losses
to all of Prince's creditors and perhaps a panic on the Board
of Trade.

12. For that the finding of said Master on p. 17 of his
report assumes a scheme planned by Castle on February 10 to
force Prince to turn over his trades so the bank could get
the margin certificates; whereas the evidence shows the turn-
ing over of the trades to Anderson & Co. was not considered
until Anderson & Co. advised it, February 14, 1905.

13. For that the said Master found (p. 15) that the Bank
was in a better position than any other of Prince's creditors
to know his financial condition; whereas there is no evidence
in the record as to Prince's relations with any other of his
creditors.

14. For that the said Master found (p. 17) that Prince was
at the Bank and in conference with Castle on every day from
February 10 to February 15th; whereas there is no com-
petent evidence of any conference except on February
114 10th and February 14th.

15. For that the said Master found (p. 20) that on
February 10th E. H. Prince and Mr. Castle applied \$3095.00,
standing to Prince's credit in his checking account with said
bank, on E. H. Prince's indebtedness to said bank. Whereas
the evidence shows the application was made by the Bank
alone.

16. For that the Master held (p. 26) that this case comes within Section 68b of the Bankruptcy Act, whereas Sec. 28b has no application to the case but applies only to a creditor securing a set-off against money due the insolvent from said creditor.

17. For that the Master held (p. 24, 25) as a matter of law that Sec. 68a of the Bankruptcy Act applies only in cases where the amount against which the set-off is claimed is in a general checking account; whereas all that is required is that there be a debt due the insolvent from the creditor.

18. For that the said Master finds (p. 21) that E. H. Prince endorsed the margin certificates involved in this controversy on February 15, 1905; whereas there is no evidence in the record that said margin certificates were ever endorsed by E. H. Prince.

19. For that said Master has considered the testimony of Charles C. Wolf and has made numerous findings of fact based entirely on such testimony (pp. 17-18, 19, 21) which was taken in the case of Wolf v. Federal Trust & Savings Bank and read into this record against the objection of the defendant; whereas all of said testimony is incompetent.

20. For that the said Master found (p. 19) that the Federal Trust & Savings Bank had knowledge of the insolvency of E. H. Prince on February 10, 1905; whereas the evidence does not establish such fact.

TENNEY, COFFEEN, HARDING & SHERMAN,
Solicitors for Federal T. & S. Bk.

(Endorsed) Filed May 1911. C. B. Morrison, Master in Chancery.

115 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company	} No. 9743.
<i>vs.</i>	
Federal Trust & Savings Bank and	
W. P. Anderson & Co.	

ADDITIONAL OBJECTIONS TAKEN BY THE DEFENDANT FEDERAL TRUST & SAVINGS BANK TO THE REPORT OF THE MASTER IN CHANCERY TO WHOM THIS CASE STANDS REFERRED.

1. In that the Master has found that interest is due complainant on the sum of \$4825.79 from Nov. 25, 1905; whereas complainant is not entitled to such interest.

2. For that the said Master has found that there was a preference made to this defendant (p. 21-22) of an item of \$575.79 claimed by the complainant in the amendment to his bill and made no finding as to defendant's plea of the Statute of Limitations filed to said amendment; whereas said Master should have found that complainant's right to this item was barred by the Statutes of limitations.

TENNEY, COFFEEN, HARDING & SHERMAN,
Solicitors for Defendants.

171 And afterwards, to wit, on the 31st day of May A. D. 1911, the following order was had and entered of record in said cause, to wit:

Chicago Title & Trust Co.,	} No. 9743.
<i>vs.</i>	
Federal Trust & Savings Bank, <i>et al.</i>	

On motion It is Ordered by the court that the hearing on the Master's Report filed herein be set for June 10, 1911.

172 And afterwards, to wit, on the 7th day of June A. D. Order
7,
1911, the following order was had and entered of record
in said cause, to wit:

Chicago Title and Trust Company, Trustee. <i>vs.</i> Federal Trust & Savings Bank	}	No. 9743.
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On motion, It is Ordered by the court that this cause be
and it hereby is set down for hearing on June 24, 1911, on the
exceptions to the Master's Report.

173 And afterwards, to wit, on the 22nd day of June A. D. Order
22
1911, the following order was had and entered of record
in said cause, to wit:

Chicago Title & Trust Company, <i>vs.</i> Federal Trust and Savings Bank and W. P. Anderson and Company.	}	No. 9743.
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On motion of the Attorneys for the defendants in the above
entitled cause, It is hereby Ordered that the objections filed
by the defendant Federal Trust and Savings Bank, to the
report of the Master in Chancery, Charles B. Morrison, here-
tofore filed in said cause on the 24th day of May, 1911, stand
as exceptions of said defendant before this court to the re-
port of the Master aforesaid.

174 And afterwards, to wit, on the 2nd day of October, A. Order
2,
D. 1911, the following order was had and entered of rec-
ord in said cause, to wit:

Chicago Title & Trust Co., <i>vs.</i> Federal Trust & Savings Bank.	}	No. 9743.
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Come the parties by their attorneys and on motion It is
Ordered by the court that the exceptions to the Masters re-
port be set for hearing on October 14, 1911.

Jan. 175 And afterwards, to wit, on the 18th day of January
A. D. 1912, the following order was had and entered of
record in said cause, to wit:

Chicago Title & Trust Co., Trustee of Earl H. Prince, Bankrupt,	} No. 9743.
<i>vs.</i>	
Federal Trust and Savings Bank and W. P. Anderson & Company.	

This cause coming on to be heard upon the pleadings heretofore filed herein, and the Report of the Master in Chancery to whom this cause was, by order of this Court heretofore referred, to take proofs and to report the same, together with his findings of fact and of law; and upon the transcript of the evidence heard and returned by the said Master, with and as a part of his said report; and upon the exceptions taken in this court to said report.

And the Court having heard arguments of counsel for all the parties, and now being fully advised in the premises, finds that it has jurisdiction over the parties to this cause, and the subject matter thereof.

The Court further finds the facts as found by said Master in his said report.

The court further finds that the exceptions to said report of said Master are not well taken.

It is therefore Ordered, Adjudged and Decreed that the exceptions to said Master's Report be, and they are hereby, each and every one of them overruled; and that said Master's Report be, and it is hereby, in all parts, approved and confirmed.

It Is Further Ordered, Adjudged and Decreed that the defendant, The Federal Trust and Savings Bank, pay to the said complainant as Trustee of Earl H. Prince, bankrupt, the sum of Six Thousand Three Hundred and Nine and 70/100 Dollars (\$6309.70), with interest at the rate of five per cent (5%) per annum from the date of this decree, and that the said complainant have execution therefor as on a judgment at law.

It Is Further Ordered, Adjudged and Decreed that the complainant have and recover of and from the defendant,

Federal Trust and Savings Bank, its costs herein, to be taxed, ^{De} and that the complainant have execution therefor.

It Is Further Ordered, Adjudged and Decreed that this cause be, and the same is, hereby dismissed as to W. P. Anderson & Company at the costs of said complainant.

179 And afterwards, to wit, on the 2nd day of February, ^{Fi}
A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for Appeal; same being in the words and figures following, to wit:

United States of America }
Northern District of Illinois }
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Chicago Title & Trust Company, }
Trustee, }
vs. } No. 9743.
Federal Trust & Savings Bank and }
W. P. Anderson and Company.

Now comes the Continental and Commercial Trust & Savings Bank, a corporation, by its solicitors, and shows this Honorable Court that during the year 1905 the Federal Trust & Savings Bank, a corporation, the original defendant in this suit, was consolidated with the American Trust and Savings Bank, a corporation, under the name of the latter corporation.

That during the year 1910 the said American Trust & Savings Bank, a corporation, duly changed its corporate name to Continental and Commercial Trust & Savings Bank, and that it still exists and is doing business under the name last mentioned, and is the successor of the Federal Trust & Savings Bank.

Your petitioner therefore prays that an order be entered

of record substituting the name Continental and Commercial Trust & Savings Bank, a corporation, in the place and stead of the Federal Trust & Savings Bank, a corporation, which has ceased to exist.

180 Your petitioner, Continental and Commercial Trust & Savings Bank, a corporation, by its solicitors, shows to this Honorable Court that it conceives itself aggrieved by the decree entered by this court on the 18th day of January, A. D. 1912, herein, in and by which it was, among other things, Ordered, Adjudged And Decreed that your petitioner's exceptions to the Master's report filed herein be overruled and said report approved and judgment entered in favor of the complainant against your petitioner. And your petitioner filed herewith its assignment of errors and makes them a part hereof, and hereby respectfully appeals from the decree herein to the United States Circuit Court of Appeals, for the Seventh Circuit and prays that this appeal be allowed to it, and that the transcript, record, proceedings and papers upon which said decree above mentioned was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh District.

TENNEY, COFFEEN, HARDING & SHERMAN,
*Solicitors for Continental and Commercial
Trust & Savings Bank.*

Endorsed: No. 9743 In the United States District Court, Northern District of Illinois Eastern Division. Chicago Title & Trust Company, Trustee, vs. Federal Trust & Savings Bank and W. P. Anderson & Company. Petition for Appeal. Filed Feb. 2, 1912 at o'clock M. T. C. MacMillan, Clerk.

181 And afterwards, to wit, on the 2nd day of February, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors; same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

File
2,

For the Northern District of Illinois,

Eastern Division.

Chicago Title & Trust Company

vs.

The Continental and Commercial
Trust & Savings Bank, and W. P.
Anderson & Company.

} No. 9743.

ASSIGNMENT OF ERRORS.

Now comes the Continental and Commercial Trust & Savings Bank, one of the defendants herein, and assigns the following errors upon the order and decree of the said District Court entered herein on the 18th day of January, 1912, to wit:

1. The said court erred in holding that the said defendant bank had no right, under Section 68a of the Bankruptcy Act, to set off indebtedness due it from Prince against the \$4,250 on deposit in defendant bank, and for which margin certificates had been issued.

2. The Court erred in holding that the application by the defendant bank of the \$4,250 on deposit for which margin certificates had been issued, on the indebtedness due the defendant bank from Prince constituted a voidable preference under the Bankruptcy Act, and can be recovered by the complainant in this action.

3. The court erred in entering a decree for \$6,309.70, or for any amount whatever, against the Federal Trust & Savings Bank.

182 4. The court erred in holding that the defendant bank had no right under the Bankruptcy Act to set off indebtedness due it from Prince against the \$575.79 remaining in Prince's checking account on February 14, 1905.

5. The court erred in failing to hold that the Federal Trust & Savings Bank had a right under the Bankruptcy Act to set off indebtedness due it from Prince against the amount remaining in Prince's checking account on February 14, 1905.

6. The court erred in allowing interest in its decree en-

tered herein on the amount found due the complainant from the Federal Trust & Savings Bank.

7. The court erred in holding that the act of the defendant bank in setting off indebtedness due it from Prince against the \$4,250 on deposit in said bank, for which margin certificates had been issued, was a violation of Section 68b of the Bankruptcy Act.

8. The court erred in holding that the act of the bank in setting off indebtedness due it from Prince against the \$575.79 remaining in Prince's checking account on February 14, 1905, was a violation of Section 68b of the Bankruptcy Act.

9. The court erred in overruling the exceptions filed, and each of them, by the defendant bank to the report of the Master filed herein, and in approving said report.

10. The Court erred in failing to sustain each of the exceptions of the defendant bank filed to the report of the Master herein.

11. The court erred in overruling the exceptions filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"In that the Master has found that the application of the proceeds of \$4,250 of margin certificates constitutes a preferential payment, whereas he should have found that the indebtedness represented by these certificates was incurred by the bank before it knew of Prince's insolvency, and is a debt against which Prince's indebtedness to the bank can be set off."

183 12. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master found (p. 22) that there was a transfer of the margin certificates (amounting to \$4250) to the Federal Trust & Savings Bank with a view to use this amount as a set-off against E. H. Prince's indebtedness to said bank, whereas there is no evidence any one ever transferred said margin certificates to said bank."

13. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master has found (p. 23) that the deposit of \$575.79 constitutes a preferential payment, whereas he should have found that it does not constitute a payment

at all, but a claim against which the Bank's claim against Prince can be set off." File 2,

14. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master found (p. 21-22) that there was a transfer of the item of \$575.79 made to the Federal Trust & Savings Bank with intent to use this amount as a set off against Prince's indebtedness to the bank. Whereas the Master should have found first, that there was no intention on Prince's part to prefer, the bank to the extent of \$575.79, nor any other amount, nor reasonable ground for belief on the part of the Bank that a preference was intended, and second, that said amount was deposited with the bank with the intention that the bank should use the same, not as a set off, but for the purpose of paying an unknown amount of checks."

15. The Court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master found (p. 21) that during the five days preceding the filing of the petition in Bankruptcy against E. H. Prince it was the intention of E. H. Prince and the Federal Trust & Savings Bank to apply all of Prince's available assets to his indebtedness to said Bank, and to so dispose of Prince's business and open trades as to realize the greatest possible amount for said bank to the entire exclusion of all other creditors of said E. H. Prince; whereas the Master should have found that it was the intention of Prince and the Bank to protect Prince's creditors and those dealing on the Board of Trade."

184 16. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master found (p. 20) that Mr. Castle, Vice President of the Federal Trust & Savings Bank, on February 10, and the five days next following, undertook to shape the affairs of E. H. Prince so that all of said E. H. Prince's assets might be acquired by The Federal Trust & Savings Bank, with knowledge during all of this time that the said Prince would soon be bankrupt; whereas the evidence shows that the plan adopted was adopted at the suggestion of An-

derson & Co. to make the loss as small as possible and save for the creditors the greatest amount of assets."

17. The Court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the Master found (p. 17) that the arrangement made by the bank and Prince for the honoring of certain checks and not others, was made primarily in the interest of the Bank; whereas the Master should have found that such arrangements were made primarily for the benefit of Prince and his creditors generally and with a view to giving Prince a chance to meet his obligations—not for the purpose of giving the Bank a chance to get the margin certificates."

18. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the Master has found (p. 16) that on February 10, 1905, the relations that had theretofore existed between the bank and Prince were terminated. Whereas the Master should have found that the relations of bank and customer remained unchanged except in one particular, i. e., that not all but a portion of Prince's checks should be honored by the bank."

19. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the Master has found (p. 24) that Prince has no general account with the bank. Whereas he should have found that at all times he did have such an account."

20. The Court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

185 "For that the Master has found that the return of the margin certificates was accomplished by the combined efforts of Prince and Castle. Whereas he should have found that they were surrendered as the result of the advice given by Anderson & Co. and not otherwise."

21. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master found (p. 21) that on February 14, 1905, E. H. Prince and Mr. Castle induced the defendant Anderson & Co. to take over E. H. Prince's trades so

as to release the margin certificates involved in this controversy. Whereas the Master should have found: first, that Mr. Castle did not induce Anderson & Co. to take over Prince's trades, but Anderson & Co. advised doing so, and second, that Anderson & Co. took over such trades so as to prevent heavy losses to all of Prince's creditors and perhaps a panic on the Board of Trade."

22. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the finding of said Master on p. 17 of his report assumes a scheme planned by Castle on February 10 to force Prince to turn over his trades so the bank could get the margin certificates; whereas the evidence shows the turning over of the trades to Anderson & Co. was not considered until Anderson & Co. advised it Feb. 14, 1905."

23. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master found (p. 15) that the Bank was in a better position than any other of Prince's creditors to know his financial condition; whereas there is no evidence in the record as to Prince's relations with any other of his creditors."

24. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the Master found (p. 17) that Prince was at the bank and in conference with Castle on every day from February 10 to February 15th; whereas there is no competent evidence of any conference except on February 10th and February 14th."

25. The court erred in overruling the exceptions filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

186 "For that the said Master found (p. 20) that on February 10th E. H. Prince and Mr. Castle applied \$3095.00, standing to Prince's credit in his checking account with said bank, on E. H. Prince's indebtedness to said Bank. Whereas the evidence shows the application was made by the bank alone."

26. The court erred in overruling the exception filed by

the defendant bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the Master held (p. 26) that this case comes within Section 68b of the Bankruptcy Act, whereas Section 68b has no application to the case but applies only to a creditor securing a set-off against money due the insolvent from said creditor."

27. The court erred in overruling the exception filed by the defendant Bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the Master held (p. 24, 25) as a matter of law that Sec. 68a of the Bankruptcy Act applies only in cases where the amount against which the set-off is claimed is in a general checking account; whereas all that is required is that there be a debt due the insolvent from the creditor."

28. The court erred in overruling the exception filed by the defendant Bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that the said Master finds (p. 21) that E. H. Prince endorsed the margin certificates involved in this controversy, on February 15, 1905; whereas there is no evidence in the record that said margin certificates were ever endorsed by E. H. Prince."

29. The court erred in overruling the exception filed by the defendant Bank to the report of the Master in Chancery filed in said cause, which reads as follows:

"For that said Master has considered the testimony of Charles C. Wolf and has made numerous findings of fact based entirely on such testimony (pp. 17-18-19-21) which was taken in the case of Wolf v. Federal Trust & Savings Bank and read into this record against the objection of the defendant; whereas all of said testimony is incompetent."

Said testimony in substance was that Wolf had for many years been dealing with Prince and in said dealings had turned over to Prince a certificate of deposit for \$24,000 on the State Bank of Parkersburg, Iowa, and certain certificates of the capital stock of said bank. That Prince telephoned Wolf to come to Chicago and Wolf came on February 13, 1905,

and had a conference with Prince and Castle. That 187 Prince's affairs were talked over and Wolf was told that

Prince was in financial difficulties, that his loan had been called and he must have help or quit business. They wanted Wolf to take up the certificate of deposit and Wolf refused.

The Master made numerous findings of fact based entirely on this testimony. File 2

30. The court erred in overruling the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which reads as followse:

"For that the said Master found (p. 19) that the Federal Trust and Savings Bank had knowledge of the insolvency of E. H. Prince on February 10, 1905; whereas the evidence does not establish such fact."

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK.

By TENNEY, COFFEEN, HARDING & SHERMAN,
its solicitors.

Endorsed: No. 9743. In the United States District Court, Northern District of Illinois, Eastern Division. Chicago Title & Trust Company vs. Continental and Commercial Trust & Savings Bank, and W. P. Anderson & Company. Assignment of Errors. Filed Feb. 2, 1912 T. C. MacMillan, Clerk.

177 And afterwards, to wit, on the 2nd day of February Ord 2
A. D. 1912, the following order was had and entered of record in said cause to wit:

Chicago Title & Trust Company	} 9743
<i>vs.</i>	
Federal Trust & Savings Bank and	
W. P. Anderson & Co.	

Comes the Continental & Commercial Trust and Savings Bank, a corporation, by its solicitors, and on their motion for an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the decree heretofore entered herein on January 18, 1912, it appearing that said Continental & Commercial Trust and Savings Bank, a corporation, has filed its petition for an appeal and its assignment of errors, it is Ordered by the court that said appeal be and it hereby is granted upon the filing of an appeal bond in the sum of seventy-five hundred dollars, and thereupon said Continental & Commercial Trust and Savings Bank presents to the court for approval its appeal bond for the amount fixed by the court, and it appearing that the same is in legal form, properly conditioned with good and sufficient sureties, it is Ordered that said bond be and the same hereby is approved.

b.

178 And afterwards to wit, on the 2nd day of February, A. D. 1912, the following order was had and entered of record in said cause, to wit:

Chicago Title & Trust Company	} 9743
<i>vs.</i>	
Federal Trust & Savings Bank and W. P. Anderson & Co.	

Comes the Continental & Commercial Trust and Savings Bank, a corporation, by its solicitors, and on their motion and for good and sufficient reasons to the court shown it is Ordered by the court that the Continental & Commercial Trust and Savings Bank be and it hereby is substituted in the place and stead of the Federal Trust & Savings Bank, a corporation, one of the defendants herein which has ceased to exist.

188 And afterwards, to wit, on the 2nd day of February, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond on Appeal; same being in the words and figures following, to wit:

Know All Men By These Presents, That we, Continental and Commercial Trust and Savings Bank, a corporation, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto Chicago Title and Trust Company a corporation as Trustee in Bankruptcy of the estate of Earl H. Prince, in the full and just sum of Seventy-Five Hundred Dollars, (\$7500.00) to be paid to, the said Chicago Title and Trust Company Trustee in Bankruptcy, its attorneys, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this second day of February in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said court, between Chicago Title and Trust Company, Trustee in Bankruptcy of the estate of Earl H. Prince, complainant, and Federal Trust and

Savings Bank, a corporation and W. P. Anderson & Company, defendants, a decree was rendered against the said Federal Trust and Savings Bank, a corporation, and the said Continental and Commercial Trust and Savings Bank, a corporation, successor to the Federal Trust and Savings Bank, a corporation, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said Chicago Title and Trust Company, Trustee in Bankruptcy, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago within thirty days from the date hereof.

189 Now, The Condition Of The Above Obligation Is Such That if the said Continental and Commercial Trust and Savings Bank, a Corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

W. ROPP.

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK. Seal.

By DAN WM. ABBOTT
Vice President. Seal.

Attest,

FRANK H. JONES,
Secretary.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND. Seal.

By WILLIAM G. KRESS
Agent and Attorney in Fact.
(Seal)

Approved by

CARPENTER, Judge.

2 February 1912.

Endorsed: 9743. District Court of the United States, Northern District of Illinois, Eastern Division. Chicago Title & Trust Co. Continental and Commercial Trust & Savings Bank et al, Bond On Appeal. Filed Feby 2, 1912, T. C. Mac-Millan, Clerk.

192

DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

Chicago Title & Trust Co., Trustee
vs.
Federal Trust & Savings Bank *et al.* } No. 9743

To the Clerk of the District Court:

Please prepare a transcript of the record of the above entitled cause for the United States Circuit Court of Appeals for the Seventh Circuit. You are directed to incorporate in said transcript of record the following:

1. The Bill of Complaint.
2. Subpoena.
3. Appearance of Federal Trust & Savings Bank and W. P. Anderson & Co., defendants.
4. Demurrer to Bill of Complaint filed by Federal Trust & Savings Bank.
5. Demurrer to Bill of Complaint filed by W. P. Anderson & Co.
6. Answer of Federal Trust & Savings Bank to Bill of Complaint.
7. Answer of W. P. Anderson & Co. to Bill of Complaint.
8. Amendment to Bill of Complaint.
9. Answer of Federal Trust & Savings Bank to Amendment to Bill of Complaint.
10. Answer of W. P. Anderson & Co. to Amendment to Bill of Complaint.
11. Replication of Complainant to Answer to Bill of Complaint.
12. Replication of Complainant to Answer to Amendment to Bill of Complaint.
13. Transcript of Evidence; Complainant's Exhibits 1, 2, 3 and 4; objection to Master's Report.
14. Report of Charles B. Morison, Master in Chancery.
15. Decree and all orders entered by the court in said cause.

16. Petition for Appeal and Assignment of Errors.
17. Appeal Bond.
18. Citation.

TENNEY, COFFEEN, HARDING & SHERMAN,
*Solicitors for Continental and Commercial
Trust & Savings Bank.*

Dated, Feb. 3, 1912. C. 5384.

193 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in Case No. 9743—wherein Chicago Title & Trust Company, Trustee of Estate of Earl H. Prince, Bankrupt, is Plaintiff and Federal Trust & Savings Bank and W. P. Anderson & Company are defendants, prepared in accordance with praecipe filed herein and attached hereto, same appears from the records and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office at Chicago, in said District, this 2nd day of March, A. D. 1912.

T. C. MACMILLAN,
Clerk.

(Seal)

190 And afterwards, to wit, on the 2nd day of February, A. D. 1912, there was issued out of and under the seal of said Court, in the above entitled cause, a Citation; same being in the words and figures following, to wit:

191 United States }
of America, } ss.

The President of the United States To Chicago Title & Trust Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an order allowing an appeal entered in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Northern Division, wherein is pending a certain action wherein the Chicago Title & Trust Company, Trustee in Bankruptcy of the Estate of Earl H. Prince is complainant and the Continental & Commercial Trust & Savings Bank, a corporation is one of the defendants and is the appellant herein said cause being number 9743 in said court, and you are then and there required to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing an appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness George A. Carpenter, one of the Judges of the District Court of the United States, this second (2nd) day of February, in the year of our Lord one thousand nine hundred and twelve (1912).

GEORGE A. CARPENTER,
Judge.

Service of this citation accepted Feby 2, 1912.

CHICAGO TITLE & TRUST CO., TRUSTEE, ETC.,
By PRINGLE, NORTHRUP & TERMILLIGER,
Its Solicitors.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 126, inclusive, contain a true copy of the printed record, printed under my supervision, and filed April 13, 1912, on which this cause was argued, heard and determined in the case of Continental & Commercial Trust & Savings Bank vs. Chicago Title & Trust Company, Trustee in Bankruptcy of Earl H. Prince. No. 1894, October Term, 1911, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-ninth day of July A. D. 1912.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,

*Clerk of the United States Circuit Court of
Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1911, of the October Term, in the year of our Lord one thousand nine hundred and eleven, and of our Independence the one hundred and thirty-sixth year.

And afterwards, to-wit: On the ninth day of March, 1912, in the October Term last aforesaid, came the Appellant by its counsel, Mr. Horace Kent Tenney, Mr. Charles F. Harding, Mr. Roger Sherman, Mr. George T. Rogers and Mr. Harry A. Parkin, and filed in the office of the Clerk of this Court, their appearance, which is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1911.

No. 1894.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Appellant,
vs.

CHICAGO TITLE & TRUST COMPANY, Appellee.

The Clerk will enter my appearance as counsel for the Appellant.

HORACE KENT TENNEY.
CHARLES F. HARDING.
ROGER SHERMAN.
GEORGE T. ROGERS.
HARRY A. PARKIN.

Endorsed: Filed Mar. 9, 1912. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the ninth day of March, 1912, in the October Term last aforesaid, came the Appellee by its counsel, Mr. William J. Pringle and Mr. Edwin Terwilliger, Jr., and filed in the office of the Clerk of this Court their appearance, which is in the words and figures following, to-wit:—

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1911.

No. 1894.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK
vs.
CHICAGO TITLE & TRUST CO., Trustee of Earl H. Prince, Bankrupt.

The Clerk will enter my appearance as counsel for the Appellee.
WILLIAM J. PRINGLE.
EDWIN TERWILLIGER, JR.

Endorsed: Filed Mar. 9, 1912. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the nineteenth day of April, 1912, in the October Term last aforesaid, the following proceedings were had and entered of record, to-wit:

FRIDAY, April 19, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1894.

CONTINENTAL & COMMERCIAL TRUST AND SAVINGS BANK
vs.
CHICAGO TITLE & TRUST COMPANY, Trustee, etc.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

Now this day come the parties by their counsel and the appellant by its counsel moves the Court for an order extending the time to file its brief, and the appellee moves the Court that this cause be

placed on the calendar of the April Session and be set down for hearing.

On consideration of the above motions it is now ordered that appellant file its brief herein by May 13, 1912, Appellee's by May 20, 1912, and this cause is hereby placed on the calendar of the April session of this term and set down for hearing on May 28, 1912.

And afterwards, to-wit: On the twenty-eighth day of May, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

TUESDAY, *May* 28, 1912.

Court met pursuant to adjournment and was opened by proclamation of erier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. William H. Seaman, Circuit Judge.

Hon. Christian C. Kohlsaat, Circuit Judge.

Edward M. Holloway, Clerk.

Luman T. Hoy, Marshal.

1894.

CONTINENTAL & COMMERCIAL TRUST AND SAVINGS BANK
vs.

CHICAGO TITLE & TRUST COMPANY, Trustee, etc.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Horace Kent Tenney, counsel for Appellant, and by Mr. Edwin Terwilliger, Jr., counsel for Appellee, and the Court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the twenty-fourth day of June, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which is in the words and figures following, to-wit:—

In the United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1911.

No. 1894.

April Session, 1912.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Appellant,
vs.
CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy of Earl
H. Prince, Appellee.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

Before Baker, Seaman and Kohlsaat, Circuit Judges.

This appeal is from a decree of the District Court, confirming the Master's report and awarding recovery against the Appellant-Bank, as successor substituted for the Federal Trust & Savings Bank, defendant, under a bill filed by the appellee, as trustee in bankruptcy, charging that the defendant received unlawful preferences from the bankrupt. W. P. Anderson & Co. were joined as defendants in the bill, but the District Court entered a dismissal as to them, and no question is raised in respect thereof.

The material facts constituting the alleged preference are undisputed, largely embraced in stipulations, and appear as findings of fact in the Master's report, from which the following summary is extracted:

1. The proceedings in bankruptcy against the bankrupt Earl H. Prince were instituted February 15, 1905. For several years theretofore he was a member of the Board of Trade of Chicago, engaged in the buying and selling of commodities subject to the rules of the Board of Trade. During the same period the defendant, Federal Trust & Savings Bank, was engaged in general banking business in Chicago and Prince was transacting his banking business with such Bank and had a general deposit and checking account therein up to February 10, 1905.

2. The rules of the Board of Trade provided for a method of trading between its members in a so-called "ringing up of trades," whereby settlements were made through the Board for such transactions. On time contracts it was provided that purchasers shall have the right to require of sellers as security a deposit of 10% based upon the contract price of the property bought, and further security from time to time as the market advances, and that sellers shall also have the right to require as security from buyers a deposit of 10% of the contract price of the property sold and in addition any differences that may occur between the estimated value of the property and the price of sale. For these purposes the rules further provided that banks may be authorized to issue margin certificates to be used in

such cases and become authorized depositories for securities on giving bonds for the proper disposal of deposits by them, and that banks so authorized be designated as "Board of Trade Depositories." The certificates to be issued by the depository in such case were to be made in duplicate and nontransferable for all deposits made with them; were to state by whom the deposits are made and for whose account they are held and that the same are payable upon the return of the certificate or the duplicate thereof duly endorsed by the parties to the contract, or on the order of the president of the Board of Trade.

The form of the certificate is prescribed by the rules and the memorandum thereof which shall be kept, and all certificates when issued are required to be placed in the office of the Clearing-House of the Board; and all business pertaining to the issuance and use of the said certificates is required to be carried on in accordance with the rules of the Board.

3. From and after August 20, 1902, the Federal Trust & Savings Bank was a Board of Trade depository. On and prior to February 10, 1905, the bankrupt had a deposit and checking account with the Bank and at the date named was largely indebted to the Bank on demand notes and otherwise. On February 10, 1905, the Bank "called the said loans and they were not paid and thereupon the Bank applied as a payment upon the same \$3095 then on deposit in the bankrupt's checking and deposit account in the Bank," thus leaving to the credit of the bankrupt in that account only the sum of \$3.25. On the same day the Bank agreed with the bankrupt "that if he would thereafter make deposits to cover the same it would pay certain salary and pay-roll checks of employes of Prince and checks issued to the Board of Trade Clearing House." Pursuant to such agreement the Bank did pay such checks issued on several days up to February 14, amounting to \$2506.46; and Prince deposited with the Bank on February 10, \$1450, on February 11, \$310, on February 14, two deposits, one for \$820 and the other for \$499, making a total of his deposits of \$3079, all of these items being entered on the books of the Bank under date of February 14, 1905. The amounts thus deposited exceeded the amount of checks paid under the arrangement in the sum of \$572.54. This balance, together with the \$3.25 remaining to the credit of Prince on February 10, making the sum of \$575.79, was applied by the Bank on February 14 as a credit upon the general indebtedness of Prince to the Bank. Other checks drawn by Prince on and prior to February 10th, which were not included in the above mentioned arrangement then made, were subsequently presented to the Bank but payment refused.

4. At various dates between September 15, 1904, and February 9, 1905, the bank had issued to Prince margin certificates to be used by him in his Board of Trade transactions, which were placed by him in the office of the Clearing House of the Board for various sums, ranging from \$250 to \$500 in amount, aggregating \$4250. To procure such certificates Prince either gave checks against his checking account or deposited with the Bank the requisite sum of money. A record of these margin certificates was kept in the Bank in a "Margin Register" and the total of each day's margin-certificates

issued was entered in the ledger of the Bank in an account called the "Margin Account" and the total of all unpaid margins appeared on the Bank's ledger as one of the items constituting its total liabilities.

5. On February 14, 1905, Mr. Castle, the vice-president of the Bank, and Mr. Prince had a conference at the Bank in reference to the financial affairs of Prince, and while together, Mr. Castle telephoned to W. P. Anderson, president and treasurer of W. P. Anderson & Co., to join the conference. On the arrival of Mr. Anderson Mr. Castle informed him that Prince was in financial troubles in quite a number of open trades and asked Mr. Anderson's advice as to the best way to close them. "Mr. Anderson suggested that Prince transfer them to some other dealer and close them up in that way. Prince asked Mr. Anderson if his company would take them and he agreed that it would if, after examination, the trades showed a profit. Investigation was made by Mr. Anderson and he was satisfied with the conditions and on the same day, February 14, or the day following, Prince transferred all of his open trades in accordance with the rules of the Board, and Anderson & Co. assumed and agreed to carry out the contracts with the various parties with whom they were made." On February 15th the secretary of the Board of Trade on request of Anderson & Co. notified members having trades with Prince to transfer them to Anderson & Co. and "that Prince's sheet would clear on that day, as usual, but that rings made for the following day would be closed by Anderson & Co." Anderson & Co. thereafter settled the transactions, putting up its own securities in the place of the certificates deposited by Prince, to secure the same and the Prince certificates were taken up by Anderson & Co. and turned over to the Bank on that day. When these certificates were turned over to the Bank, Prince was indebted to it in a sum greatly exceeding the amount of the certificates, and the Bank thereupon credited the amount thereof, \$4250 on account of such indebtedness.

The finding further states: At the date of these transfers of the open trades of Prince, the condition of the market was such "that the aggregate sum of the amounts due thereon to Prince from the members of the Board of Trade, if he had then settled the trades, would have been greater than the aggregate sums of the amount then due thereon from Prince to others of said members of the Board. Among the open trades so transferred and settled were trades with members of the Board who held securities on margin certificates furnished by Prince." The market was constantly changing and "if the trades with the members holding Prince margin certificates had been closed at the opening of the Board of Trade on that day by the members holding them, there would have been due from them to Prince in the aggregate a balance of approximately one-third of the amount of the certificates after deducting therefrom the amount that would have been due to them from Prince. If the trades had been closed later in the day, the balance coming to Prince would have been considerably less. However, if Prince had carried out all of these contracts, the profits which would have been made upon some of them would have been about balanced by the losses which he would have sustained on others."

6. On February 15, 1905, the proceedings in bankruptcy were instituted and the appellee was eventually appointed trustee in bankruptcy. The indebtedness of the bankrupt at the date of the above mentioned transfer of his trades exceeded the sum of \$100,000 to numerous creditors, aside from the Bank, and his assets were less than \$50,000 in value.

7. Circumstances appear in the relations between the Bank and Prince which leave no room for doubt, that the Bank had, on and after February 10, reasonable cause to believe that Prince was insolvent; that the transactions between February 10 and February 14 were "calculated to keep Prince going and to protect the Clearing House, as well as the Bank" without protection for general creditors; that the transactions of February 14 and 15 were "primarily in the interest of the Bank" and were intended for its benefit. The Master thus states his ultimate finding of fact thereupon:

"The conduct of Prince's affairs for the five days preceding the filing of the petition against him is of such a character as to exclude every other conclusion except that it was the intention of both Prince and Castle to reduce Prince's indebtedness to the Bank as much as possible, by applying thereon all of his available assets and by so disposing of his business and open trades on the Board as to realize the greatest possible amount for the Bank to the exclusion of his other creditors."

The Master reported his conclusions of law, which were adopted by the District Court, in substance, as follows: (1) That the transaction of February 10, whereby the Bank applied the sum of \$3095.00 out of the balance of Prince's credit then appearing in his banking account upon his indebtedness to the Bank on promissory notes, was not an unlawful preference; (2) that the application made February 14 on such prior indebtedness of \$575.79 then remaining as a credit to Prince under the special deposit arrangement entered into February 10, constituted an unlawful preference; (3) that like application of \$4250.00, on February 15, as the amount of "margin certificates" delivered to the Bank under the arrangement with W. P. Anderson & Co., constituted an unlawful preference; (4) that the complainant, trustee in bankruptcy, is entitled to recover, accordingly, \$4,825.79, together with interest from November 25, 1905, when payment was demanded and refused.

SEAMAN, *Circuit Judge*, after making the foregoing statement, delivered the opinion of the court:

The appellant-Bank is successor in interest and liability to The Federal Trust & Savings Bank, original defendant named in the bill filed by appellee, as trustee in bankruptcy, to recover the amount of alleged unlawful preferences obtained from the bankrupt, Earl H. Prince; and this appeal is from a decree which approves the Master's report therein and awards such recovery upon two transactions, namely: One of \$575.79, as a balance of certain deposits made by the bankrupt under special arrangement with the Bank, between February 10 and 14, appropriated by the Bank immediately prior to the bankruptcy proceedings, and the other amounting to \$4250

for so-called "margin certificates" theretofore issued by the Bank for special deposits made by the bankrupt, which were obtained and appropriated by the Bank on February 15, the day on which the proceedings in bankruptcy were instituted. Both amounts were applied by the Bank as credits upon preëxisting indebtedness of the bankrupt under promissory notes. The circumstances attending these transactions, together with the facts from which the nature of each must be ascertained, are not only settled by the Master's findings of fact, but are undisputed. While objection is urged to inferences of fact found by the Master as to the mutual intention of the parties in the outcome—in substance to benefit the Bank out of such assets to the exclusion of other creditors—as unwarranted by evidence, we believe no doubt is entertainable of the intention to give and obtain a preference over other creditors, with mutual knowledge of the bankrupt's insolvency, if, in other respects, the transactions (one or both) were violations of the Bankruptcy Act. The issue in each instance, therefore, is one of law, whether the amounts thus obtained and applied constituted unlawful preferences, with the solution of each resting on established facts as to the relation existing between the bankrupt and the Bank in the matters so applied.

Counsel for the appellant contends for reversal, mainly if not entirely, on this proposition in substance: That the various deposits by the bankrupt, out of which these appropriations arose, were made and carried in the common relation of debtor and creditor and were thus subject to the right of set-off provided by sec. 68 of the Bankruptcy Act—as upheld and defined by the Supreme Court in *N. Y. County Bank v. Massey*, 192 U. S. 138, 141, and by this court, *In re George M. Hill Co.*, 130 Fed. 315, 64 C. C. A. 561—so that both method and fact of appropriation by the Bank become immaterial, either amount being enforceable in such relation, as against the trustee in bankruptcy. The citations referred to rest on the general and well settled doctrine of the relation created between banker and depositor, when deposits are made upon general account in the ordinary course peculiar to banking business; and in the absence of proof that the deposit was otherwise intended and received, it may rightly be presumed that such was the nature of the transaction. On the other hand, it is equally well settled that deposits may be made and accepted for specified purposes, not within the general rule, whereby "the bank becomes bailee of the depositor" (*Marine Bank v. Fulton Bank*, 2 Wall. 252, 256; *Scammon v. Kimball, Assignee*, 92 U. S. 362, 370) or trustee of the fund, with title thereto remaining in the depositor until the purpose of deposit is discharged; and the relation thereby established is not that of debtor and creditor, although it was not intended that the identical money so deposited was to be held for the payment. It is the fund, not the particular money deposited, which becomes the subject matter of the bailment or trust, (*Woodhouse v. Crandall*, 197 Ill. 104, 5 L. R. A. and Notes; *Shoptert v. Indiana Nat. Bank*, 83 N. E. 515) as illustrated in *Bank of Brodhead v. Smith*, trustee, decided by this court in an opinion filed April 23, 1912. The tenability, therefore, of the foregoing contention hinges upon the inquiry, whether the transactions in controversy

arose out of general or special deposits under one or the other above mentioned rules.

1. The first item of \$575.79, charged as an unlawful preference, was a balance of deposit account standing in favor of the bankrupt and appropriated by the Bank, February 14, one day prior to the bankruptcy proceedings. Prince, the bankrupt, had long been engaged in business as dealer on the Chicago Board of Trade, and up to February 10 had an active general banking account with the Federal Trust & Savings Bank; also was indebted to the Bank upon promissory notes in excess of \$30,000. On February 10, the Bank "called" these loans and applied thereon \$3,095 of the balance in favor of Prince in his bank account, leaving \$3.25 as a balance of deposit account. Thereupon it was proposed and agreed on the part of the Bank, if Prince "would thereafter make deposits to cover the same, it would pay certain salary and pay roll checks of employees of Prince and checks issued to the Board of Trade Clearing House." Pursuant to this agreement deposits were made by Prince, February 10, 11 and 14, aggregating \$3,079, but entered on the books of the Bank February 14. Checks made by Prince for the stipulated purposes were paid by the Bank aggregating \$2506.46. On February 14—at a conference and arrangement for closing out the entire business of the bankrupt as hereinafter mentioned—the balance of the deposit account then standing in his favor, \$575.79, was charged off by the Bank and applied upon his indebtedness to the Bank. Irrespective of the Master's findings, that the arrangement of February 10 was "calculated to keep Prince going," was "primarily in the interest of the Bank" and intended for its benefit to the exclusion of other creditors, we are of opinion that the deposits left and made thereunder constituted special deposits, well within the above mentioned rule, whereby title to the unexpended fund remained in the bankrupt, so that the Bank was without right, either to apply the residue upon his preëxisting indebtedness, or for allowance thereof against the trustee by way of set-off. *Libby v. Hopkins*, 104 U. S. 303, 306; *Western Tie Co. v. Brown*, 196 U. S. 502, 507; *Bank of Brodhead v. Smith*, trustee, *supra*.

2. The other charge of preference—in obtaining "margin certificates" for the aggregate sum of \$4250, on the day the petition in bankruptcy was filed, which were then credited upon the preëxisting indebtedness of the bankrupt to the Bank—involves like inquiry as to the nature of the certificate and deposit thereby certified, and consideration as well of the circumstances under which they were acquired by the Bank. For both phases of the inquiry the facts in evidence are recited in the preceding statement for the purposes of this opinion, and the details do not require repetition, but the crucial facts may be briefly stated.

These certificates were issued by the Bank in its representative capacity as a "Board of Trade Depository," under the rules of the Board of Trade and its undertakings as such depository. Each certificate in controversy was issued to Prince, the bankrupt, upon his deposit of the amount thereof (either in money or by his check accepted as cash), for the purpose specified in the certificate, namely:

as pledge or security on his Board of Trade contract with a second party named therein. Each certifies the amount deposited to be payable on its return endorsed by both parties named therein, or "on the order of the President of the Board of Trade," as provided by the Board rules "under which the above named deposit has been made" and each bears designation as "not negotiable or transferable," and is signed by the cashier of the Bank. The purpose of each further appears in evidence, in accord with the recitals and plainly within the understanding of all the parties. Each of the outstanding certificates so issued to the bankrupt was on deposit with the "Clearing House of the Board," as required by the rules, evidencing the amount thus pledged with the Bank as security for the trade therein mentioned, which had not been closed. Under this state of facts, we believe the deposits thus made and accepted at the Bank were plainly so limited in their purpose, that the rule in reference to general deposits by a customer of the Bank is without force therein; that each was received and certified by the Bank, as depository of the funds thus pledged by the bankrupt for performance of his trade, creating no title thereto in the Bank, nor other right than that of bailee or stakeholder, to hold for payment in conformity with the stated purpose. So, the fact of deposit and holding thereunder vested no right in the Bank to divert the fund from such purpose and apply it upon the bankrupt's indebtedness.

The Bank, however, secured possession of these certificates before making such application and the further contention is thereupon pressed, that it is entitled to an allowance for their amount, either in that form, or by way of set-off against the trustee, notwithstanding the circumstances under which they were acquired. Arrangement to that end was made on February 14, with the Bank as the moving party, after its closure of the bankrupt's credit account as above mentioned. Mr. Anderson, another operator on the Board of Trade, was called in by the Bank for conference in respect of the bankrupt's open trades of which "quite a number" were then outstanding, inclusive of trades secured by the "margin certificates." On examination thereof Anderson was satisfied that they "showed profit," taken as an entirety, and agreed to their assumption by his corporation. All the open trades were then transferred by the bankrupt to such corporation and its substitution was carried out in the Board of Trade on the following day, resulting in release of the certificates issued to the bankrupt and on deposit for a portion of the trades thus taken over; and these certificates were received by the Anderson Company, pursuant to the Board rules on substitution of their own securities, and were thereupon delivered by them to the Bank, without intervention of the bankrupt. On the same day the bankruptcy proceedings were instituted, doubtless precipitated by the substitution.

These transactions establish, as we believe, an unlawful preference in favor of the Bank, with Anderson & Co. serving as intermediaries to that end. The various propositions advanced as to results which may have arisen through default in the bankrupt's trades, in whole or in part, in the absence of such substitution, are besides the inquiry

nor is it material what may have been the estimate of net profit in the trades, nor what portions were profitable respectively. As the transfer was made and performance of the several trades assumed by the purchaser, release of the certificates to secure performance on the part of the bankrupt was plainly intended; thereupon the bankrupt became entitled to them. Delivery of the certificates to the Bank, therefore, consummated a transfer in violation of the Bankruptcy Act, for which recovery by the trustee is expressly provided. Thus their appropriation by the Bank for credit upon the indebtedness of the bankrupt was unauthorized.

Is the Bank, however, entitled to like benefit out of the transactions through set-off in its favor, as contended? We are of opinion that no such right exists under the terms and obvious purpose of sec. 68 of the Act. The first clause (68a) cited in support thereof, provides only "for cases of mutual debts or mutual credits" between the estate and a creditor, wherein, "the account shall be stated and one debt shall be set-off against the other." In our understanding of the authorities (as above stated), these special deposits and liabilities are not embraced in such provision for set-off. But if it be assumed that the relation of debtor and creditor was created between the Bank and the bankrupt, at any stage, such relation must arise through the transaction which released the pledge, making the amount deposited payable to the bankrupt, whereby the Bank (under the assumption) becomes his debtor. Thus viewed, the claim of set-off must be rejected under the express limitations prescribed in clause *b* (2) of the section. Moreover, in *Western Tie and Timber Co. v. Brown*, 196 U. S. 502, 510, the last mentioned clause is construed to be applicable, as well, to a case of trust relation, and the opinion states that allowance of the claim of set-off, "under the circumstances disclosed would violate the plain intendment of the inhibition" of that clause.

The transcript of testimony on the part of a witness (Wolf), received in evidence under objection, upon which error is assigned, does not enter into consideration for the purposes of the appeal, and the question raised as to its admissibility becomes immaterial.

The decree of the District Court, therefore, is affirmed.

A true Copy.

Teste:

*Clerk of the United States Circuit Court of
Appeals for the Seventh Circuit.*

And afterwards, on the same day, to-wit: On the twenty-fourth day of June, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, *June 24, 1912.*

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1894.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK
VS.

CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy of Earl
H. Prince.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the twenty-eighth day of June, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Stay of Mandate, which said Petition is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Seventh Circuit.

CONTINENTAL & COMMERCIAL NATIONAL BANK OF CHICAGO
V.

THE CHICAGO TITLE & TRUST COMPANY, as Trustee in Bankruptcy
of Earl H. Prince.

The petition of the appellant in the above entitled cause respectfully shows to the court that under advice of counsel it intends to apply to the Supreme Court of the United States for the issuance of a writ of certiorari for the review of the decision and decree of this court and the Circuit Court in the above entitled cause, and that it intends to present and prosecute such petition with due diligence in accordance with the rules and practice of said Supreme Court; that the matter cannot be heard and determined in said Supreme Court before the October Term thereof of 1912.

The petitioner therefore prays that an order be entered herein staying the issuance of a mandate for the enforcement of the decree

of the court below in this cause until the determination by the Supreme Court of the United States of such petition for certiorari, and until the final determination of said cause in said Supreme Court.

HORACE KENT TENNEY,
ROGER SHERMAN,
Counsel for Appellant.

Endorsed: Filed June 28, 1912. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twenty-eighth day of June, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, June 28, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. William H. Seaman, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1894.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK OF CHICAGO
vs.
THE CHICAGO TITLE & TRUST COMPANY, as Trustee in Bankruptcy
of Earl H. Prince.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

On motion of Horace Kent Tenney and Harry A. Parkin, counsel for appellant herein, stating that the appellant intends to apply to the Supreme Court of the United States for a review of the decision herein by certiorari, it is ordered that the issuance of a mandate to the lower court for the enforcement of its decree be, and it is hereby stayed until the determination of said cause in the Supreme Court.

And afterwards, to-wit: On the seventeenth day of July, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Appeal, which said Petition is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1894.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Appellant,
vs.

CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy of Earl
H. Prince, Appellee.

Now comes your petitioner, the Continental and Commercial Trust & Savings Bank, a corporation, by its solicitors, and shows to this Honorable Court that it conceives itself aggrieved by the decree entered by this court on the 24th day of June, 1912, in and by which it was, among other things, ordered, adjudged and decreed that the decree of the District Court of the United States in this cause be approved and confirmed; and your petitioner files herewith its assignment of errors and makes them a part hereof, and hereby respectfully appeals from the said decree entered herein to the Supreme Court of the United States, and prays that this appeal be allowed to it, and that the transcript, record, proceedings and papers upon which said decree above mentioned was entered, duly authenticated, may be sent to the Supreme Court of the United States.

TENNEY, COFFEEN, HARDIN &
SHERMAN,

*Solicitors for Continental and Commercial
Trust & Savings Bank.*

Endorsed: Filed July 17, 1912. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the seventeenth day of July, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1894.

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK,
Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy of Earl
H. Prince, Appellee.

Assignment of Errors.

Now comes the Continental and Commercial Trust and Savings Bank, Appellant herein, and assigns the following errors upon the order and decree of the said United States Circuit Court of Appeals entered herein on the 24th day of June, 1912, to-wit:

1. The said court erred in holding that the said defendant bank had no right, under Section 68a of the Bankruptcy Act, to set off the indebtedness due it from Prince against the \$4,250 on deposit in defendant bank, and for which margin certificates had been issued.

2. The court erred in holding that the application by the defendant bank of the \$4,250 on deposit, for which margin certificates had been issued, on the indebtedness due the defendant bank from Prince constituted a voidable preference under the Bankruptcy Act, and can be recovered by the complainant in this action.

3. The court erred in affirming the decree of the District Court against the Continental and Commercial Trust and Savings Bank.

4. The court erred in holding that the defendant bank had no right under the Bankruptcy Act to set off the indebtedness due it from Prince against the \$575.79 remaining in Prince's checking account on February 14, 1905.

5. The court erred in failing to hold that the Federal Trust & Savings Bank had a right under the Bankruptcy Act to set off indebtedness due it from Prince against the amount remaining in Prince's checking account on February 14, 1905.

6. The court erred in holding that the act of the defendant bank in setting off indebtedness due it from Prince against the \$4,250 on deposit in said bank, for which margin certificates had been issued, was a violation of Section 68b of the Bankruptcy Act.

7. The court erred in holding that the act of the bank in setting off indebtedness due it from Prince against the \$575.79 remaining in Prince's checking account on February 14, 1905, was a violation of Section 68b of the Bankruptcy Act.

8. The court erred in overruling the errors assigned, and each of them, by the defendant Bank to the decree of the District Court, and in affirming the decree of said court.

9. The court erred in refusing to sustain each of the errors assigned by the defendant bank to the decree of the District Court herein.

10. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"In that the Master has found that the application of the proceeds of \$4,250 of margin certificates constituted a preferential payment, whereas he should have found that the indebtedness represented by these certificates was incurred by the bank before it knew of Prince's insolvency, and is a debt against which Prince's indebtedness to the bank can be set off."

11. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 22) that there was a transfer of the margin certificates (amounting to \$4250) to the Federal Trust & Savings Bank with a view to use this amount as a set off

against E. H. Prince's indebtedness to said bank, whereas there is no evidence any one ever transferred said margin certificates to said bank."

12. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master has found (p. 23) that the deposit of \$575.79 constitutes a preferential payment, whereas he should have found that it does not constitute a payment at all, but a claim against which the Bank's claim against Prince can be set off."

13. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 21-22) that there was a transfer of the item of \$575.79 made to the Federal Trust & Savings Bank with intent to use this amount as a set off against Prince's indebtedness to the bank. Whereas the Master should have found first, that there was no intention on Prince's part to prefer the bank to the extent of \$575.79, nor any other amount, nor reasonable ground for belief on the part of the Bank that a preference was intended, and second, that said amount was deposited with the bank with the intention that the bank should use the same, not as a set off, but for the purpose of paying an unknown amount of checks."

14. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 21) that during the five days preceding the filing of the petition in Bankruptcy against E. H. Prince it was the intention of E. H. Prince and the Federal Trust & Savings Bank to apply all of Prince's available assets to his indebtedness to said bank, and to so dispose of Prince's business and open trades as to realize the greatest possible amount for said bank to the entire exclusion of all other creditors of said E. H. Prince; whereas the Master should have found that it was the intention of Prince and the Bank to protect Prince's creditors and those dealing on the Board of Trade."

15. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 20) that Mr. Castle, Vice President of the Federal Trust & Savings Bank on February 10, and and the five days next following, undertook to shape the affairs of E. H. Prince so that all of said E. H. Prince's assets might be acquired by the Federal Trust & Savings Bank, with knowledge during all of this time that the said Prince would soon be bankrupt; whereas the evidence shows that the plan adopted was adopted at

the suggestion of Anderson & Co. to make the loss as small as possible and save for the creditors the greatest amount of assets."

16. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the Master found (p. 17) that the arrangement made by the bank and Prince for the honoring of certain checks and not others, was made primarily in the interest of the bank; whereas the Master should have found that such arrangements were made primarily for the benefit of Prince and his creditors generally and with a view to giving Prince a chance to meet his obligations—not for the purpose of giving the bank a chance to get the margin certificates."

17. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the Master has found (p. 16) that on February 10, 1905, the relations that had theretofore existed between the bank and Prince were terminated. Whereas the Master should have found that the relations of bank and customer remained unchanged except in one particular, i. e. that not all but a portion of Prince's checks should be honored by the bank."

18. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the Master has found (p. 24) that Prince had no general account with the bank. Whereas he should have found that at all times he did have such an account."

19. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery in said cause, which exception reads as follows:

"For that the Master has found that the return of the margin certificates was accomplished by the combined efforts of Prince and Castle. Whereas he should have found that they were surrendered as the result of the advice given by Anderson & Co. and not otherwise."

20. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 21) that on February 14, 1905, E. H. Prince and Mr. Castle induced the defendant-Anderson & Co. to take over E. H. Prince's trades so as to release the margin certificates involved in this controversy. Whereas the Master should have found; first, that Mr. Castle did not induce Anderson & Co. to take over Prince's trades, but Anderson & Co. advised

doing so, and second, that Anderson & Co. took over such trades so as to prevent heavy losses to all of Prince's creditors and perhaps a panic on the Board of Trade."

21. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the finding of said Master on p. 17 of his report assumes a scheme planned by Castle on February 10 to force Prince to turn over his trades so the bank could get the margin certificates; whereas the evidence shows the turning over of the trades to Anderson & Co. was not considered until Anderson & Co. advised it Feb. 14, 1905."

22. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 15) that the Bank was in a better position than any other of Prince's creditors to know his financial condition; whereas there is no evidence in the record as to Prince's relations with any other of his creditors."

23. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 17) that Prince was at the bank and in conference with Castle on every day from February 10 to February 15th; whereas there is no competent evidence of any conference except on February 10th and February 14th."

24. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 20) that on February 10th E. H. Prince and Mr. Castle applied \$3095.00, standing to Prince's credit in his checking account with said bank, on E. H. Prince's indebtedness to said bank. Whereas the evidence shows the application was made by the bank alone."

25. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the Master held (p. 26) that this case comes within Section 68b of the Bankruptcy Act, whereas Section 68b has no application to the case but applies only to a creditor securing a set off against money due the insolvent from said creditor."

26. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the Master held (p. 24, 25) as a matter of law that Sec.

68a of the Bankruptcy Act applies only in cases where the amount against which the set-off is claimed is in a general checking account; whereas all that is required is that there be a debt due the insolvent from the creditor."

27. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master finds (p. 21) that E. H. Prince endorsed the margin certificates involved in this controversy on February 15, 1905; whereas there is no evidence in the record that said margin certificates were ever endorsed by E. H. Prince."

28. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, on the ground there was sufficient competent evidence to sustain said decree without the incompetent evidence excepted to. The exception to the Master's report which the District Court overruled reads as follows:

"For that said Master has considered the testimony of Charles C. Wolf and has made numerous findings of fact based entirely on such testimony (pp. 17-18-19, 21) which was taken in the case of Wolf v. Federal Trust & Savings Bank and read into this record against the objection of the defendant; whereas all of said testimony is incompetent."

Said testimony in substance was that Wolf had for many years been dealing with Prince and in said dealings had turned over to Prince a certificate of deposit for \$24,000 on the State Bank of Parkersburg, Iowa, and certain certificates of the capital stock of said bank. That Prince telephoned Wolf to come to Chicago and Wolf came on February 13, 1905, and had a conference with Prince and Castle. That Prince's affairs were talked over and Wolf was told that Prince was in financial difficulties, that his loan had been called and he must have help or quit business. They wanted Wolf to take up the certificate of deposit and Wolf refused. The Master made numerous findings of fact based entirely on this testimony.

29. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"For that the said Master found (p. 19) that the Federal Trust & Savings Bank had knowledge of the insolvency of E. H. Prince on February 10, 1905; whereas the evidence does not establish such fact."

**TENNEY, COFFEEN, HARDING &
SHERMAN, *Solrs for Appellant.***

Endorsed: Filed July 17, 1912. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the seventeenth day of July, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, *July 17, 1912.*

Before Hon. Christian C. Kohlsaat, Circuit Judge.

1894.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK
vs.CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy of Earl
H. Prince.Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

Now this day comes the Continental & Commercial Trust & Savings Bank by its counsel and presents a Petition for an Appeal in this cause to the Supreme Court of the United States, together with its Assignment of Errors, and on consideration whereof, It is now here ordered that an appeal be, and the same is hereby allowed as prayed for upon the filing of a bond in the sum of eight thousand dollars (\$8,000).

And afterwards, on the same day, to-wit: On the seventeenth day of July, 1912, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Bond, which said Bond is in the words and figures, following, to-wit:

Fidelity and Deposit Company of Maryland.
Home Office: Baltimore, Maryland.

Know all men by these presents, That we, Continental & Commercial Trust & Savings Bank, a corporation, as principal, and the Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto the Chicago Title and Trust Company, a corporation, as Trustee in Bankruptcy of the Estate of Earl H. Prince, in the full and just sum of eight thousand dollars (\$8000), to be paid to the said Chicago Title and Trust Company, Trustee as aforesaid, its attorneys, successors or assign, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Signed, sealed and dated this 17th day of July, A. D. 1912.

Whereas, lately at a session of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in a suit pending in said Court, between the Chicago Title and Trust Company, Trustee in Bankruptcy of the Estate of Earl H. Prince, Complainant, and the Continental and Commercial Trust and Savings Bank, and W. P. Anderson & Co., Defendants, a decree was rendered against the said Continental and Commercial Trust and Savings Bank, and the said Continental and Commercial Trust and Savings Bank having obtained from said Court an order allowing

an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the Chicago Title and Trust Company, Trustee aforesaid, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within thirty (30) days from the date hereof; and

Whereas, the United States Circuit Court of Appeals for the Seventh Circuit did on the 24th day of June, A. D. 1912, enter an order approving and confirming the decree of the District Court of the United States, from which order of affirmance the said Continental and Commercial Trust and Savings Bank have prayed for an- obtained an appeal to the Supreme Court of the United States.

Now, therefore, if the Continental and Commercial Trust and Savings Bank shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

[SEAL.]

CONTINENTAL AND COMMERCIAL
TRUST AND SAVINGS BANK,

By GEO. M. REYNOLDS, *Pres't.*

Attest:

C. C. W.

W. P. KOPF,

Assistant Secretary.

[SEAL.]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

By ARTHUR C. ARNOLD,

Agent and Attorney-in-Fact.

Approved July 17, 1912.

KOHLSAAT, J.

Endorsed: Filed July 17, 1912. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 32, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of Continental & Commercial Trust & Savings Bank vs. Chicago Title & Trust Company, Trustee in Bankruptcy of Earl H. Prince, No. 1894, October Term, 1911, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the

Seventh Circuit, at the City of Chicago, this twenty-ninth day of July, A. D. 1912.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of
Appeals for the Seventh Circuit.*

UNITED STATES OF AMERICA, ss:

To Chicago Title & Trust Company, a corporation, trustee in bankruptcy of Earl H. Prince, bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein Continental and Commercial Trust and Savings Bank is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaatt, this seventeenth day of July, in the year of our Lord one thousand nine hundred and twelve.

KOHLSAAT, *Judge.*

Service of the above citation is hereby accepted this 17th day of July, 1912,

EDWIN TERWILLIGER, JR.,
*Counsel for Chicago Title & Trust Co.,
Trustee in Bankruptcy, of Earl H.
Prince, Bankrupt, Appellee.*

[Endorsed:] No. —. Supreme Court of the United States. Continental and Commercial Trust and Savings Bank, Appellant, vs. Chicago Title & Trust Company, Appellee. Citation to the Supreme Court of the United States.

Endorsed on cover: File No. 23,316. U. S. Circuit Court Appeals, 7th Circuit. Term No. 741. Continental and Commercial Trust and Savings Bank, appellant, vs. Chicago Title and Trust Company, trustee in bankruptcy of Earl H. Prince, bankrupt. Filed August 1st, 1912. File No. 23,316.

13
No. 741.

Office Supreme Court, U. S.
FILED.

NOV 11 1912

JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1912.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK,
Appellant,

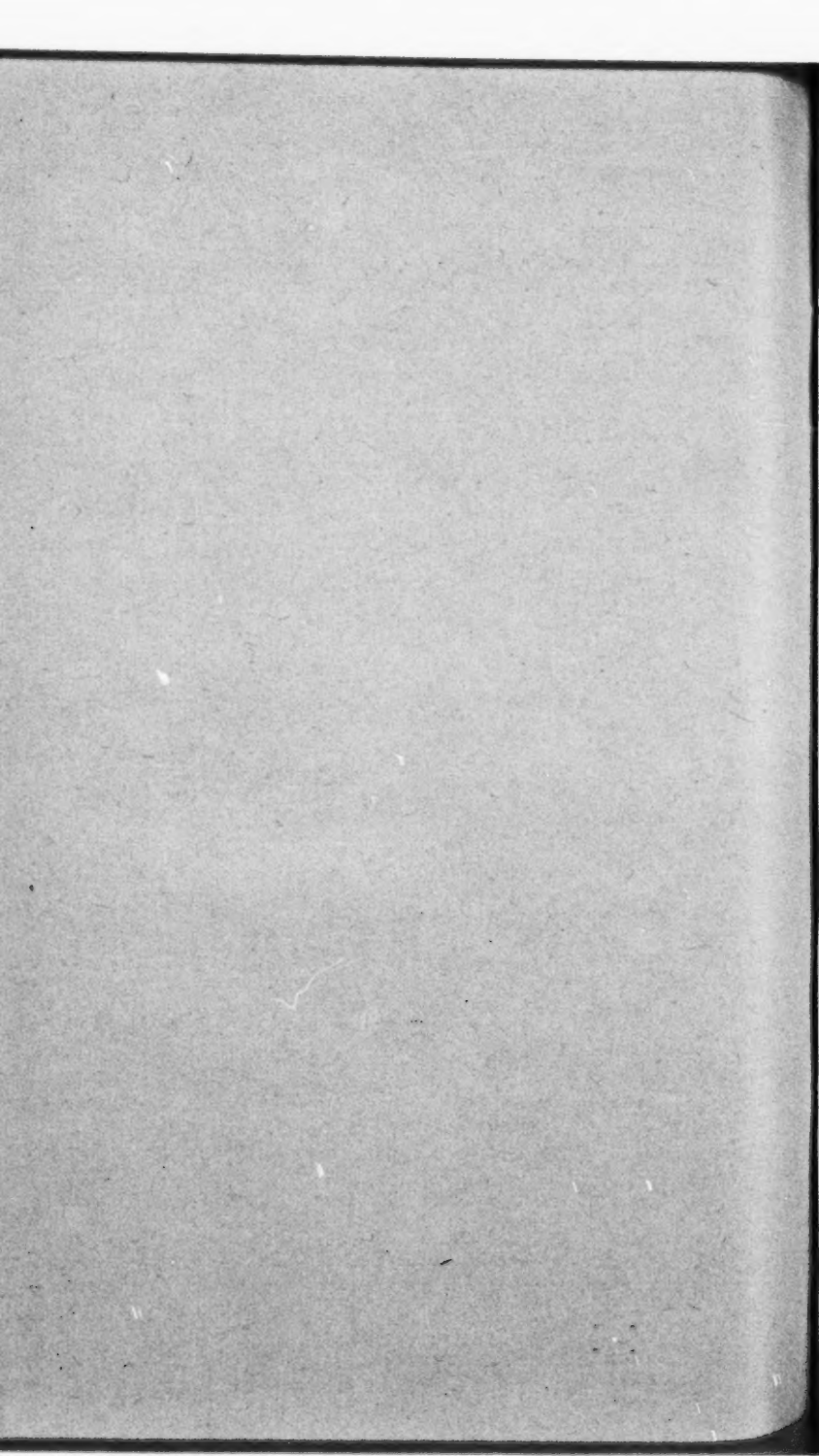
vs.

CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy
of EARL H. PRINCE, Bankrupt,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

APPELLEE'S BRIEF AND ARGUMENT ON MOTION TO AFFIRM.

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, Jr.,
Counsel for Appellee.



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IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1912.

No. 741.

CONTINENTAL & COMMERCIAL TRUST &
SAVINGS BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, Trustee in
Bankruptcy of EARL H. PRINCE, Bankrupt,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

— — — — —
**APPELLEE'S BRIEF AND ARGUMENT ON
MOTION TO AFFIRM.**

— — — — —
STATEMENT OF FACTS.

The facts upon which the decree appealed from was based were settled either by the written stipulations of the parties or by uncontradicted testimony produced by the appellee. Appellant offered no testimony whatever. The essential facts are as follows:

On February 15, 1905, a petition in bankruptcy was filed against Earl H. Prince. He was adjudicated bankrupt and appellee appointed trustee. His estate was woefully insolvent. He owed over \$100,000 to general creditors, and about \$1,000 in wages to employes. (Trans., 75.) The sale of his assets netted the trustee only \$1,180.33 (Trans., 79)—not enough to pay wage claims in full after deducting expenses of administration. He was a member of and operating as a broker on the Chicago Board of Trade. He was indebted to the Federal Trust and Savings Bank—since merged with appellant—on demand notes, in the sum of \$37,000—over one-third of his total liabilities. On February 10, 1905, the bank learned of some trouble between Prince and one Wolf about a \$24,000 certificate of deposit issued by the Parkersburg State Bank, and that the Parkersburg Bank disputed liability on it. (Trans., 43.) The bank thereupon, on February 10, called all of Prince's loans, and, on his failure to pay, appropriated and applied on the debt a balance of \$3,095 then remaining to the credit of Prince in his deposit and checking account with the bank. (Trans., 76.)

The bank then agreed with Prince to pay certain specified salary, pay roll and Board of Trade Clearing House checks if Prince would thereafter deposit sufficient funds to cover the same. The total of such checks so agreed to be paid was \$2,506.46. But Prince deposited \$575.79 more than enough to cover the specified checks. Checks other than those specified were presented for payment in the meantime and payment refused by the bank. The deposits

were made on February 10th, 11th and 14th, but were not credited to his account until February 14th, on which day the bank made a second appropriation and applied the said \$575.79 on its debt. (Trans., 76.)

The rules of the Board of Trade provide that, on time contracts, commonly referred to as "open trades," purchasers and sellers may require of the other party to the trade, as security, a deposit of 10 per cent., based upon the contract price of the property bought or sold (Trans., 5); that all securities shall be deposited either with the treasurer of the board or with some bank duly authorized by the directors to receive such deposits; that all banks which may be appointed to act as depositories for securities shall be required to have an executive officer member of the Board, who shall be amenable to the rules of the board in matters of dispute arising from any transactions on the Board, between the banks and members of the Board, and shall execute and file with the secretary a bond, with sureties, to be approved by the directors, for the proper disposal of such deposits, in accordance with the rules. The form of certificate to be issued by such depository as evidence of the deposit is fixed by the rules. They are required to be issued in duplicate, not transferable. They shall state "by whom the deposit is made, for whose security the same is held, that the deposit has been made under the rules of the Board and is payable on return of the certificate or duplicate endorsed as provided by the rules. All deposits so made shall be held to have been made *as security* for the faithful fulfillment

of any contracts between the parties during the time the deposit shall remain unpaid, but may be made applicable to a particular contract."

The defendant bank was such a Board of Trade depository. It had executed its bond to the Board in the sum of \$50,000, conditioned as follows (Trans., 73):

"Whereas, the rules of the said Board of Trade provide for the making of deposits, as margins, and as security or further security upon time contracts between members of said Board; and,

"Whereas, persons concerned in such contracts, either as purchasers or sellers, or their representatives respectively, may hereafter, from time to time, desire to make such deposits with said Federal Trust and Savings Bank; and,

"Whereas, the said bank therefore desires to be authorized and qualified to act as a depository in such cases within the meaning of such rules, as they now exist, or may hereafter be altered or amended.

"Now, therefore, the condition of the foregoing obligation is such that if the said Federal Trust and Savings Bank of Chicago shall faithfully perform its duty in the premises in respect to the proper disposal of all such securities or margins, in accordance with the rules, regulations and by-laws of said Board of Trade, then this obligation shall be void, but otherwise the same shall remain in full force."

Prince had a large number of such time contracts with other members of the Board of Trade, for the purchase and sale of grain and other commodities at various prices. A large number of these time contracts had profits of great value to Prince, and on others of said contracts there were liabilities un-

der the prevailing market prices, to other members of the Board. By an agreed statement of facts stipulated to by the parties hereto, to use upon the hearing, it was admitted that on February 15th, when Prince's trades were transferred as herein-after stated, the aggregate sum of the amounts due to Prince from members of the Board on trades under the market price then prevailing was greater than the aggregate sum of the amounts due from Prince to other members of the Board. (Trans., 72.) Previous to February 10th, Prince had made several deposits with the bank, as a Board of Trade depository, under the rules of the Board of Trade, as security on contracts between himself and other members of the Board. The total amounts so deposited as security with the depository was \$4,250. It was further stipulated, as a fact, that if the margined or secured trades had been closed at the opening of the Board on February 15th, there would have been due to Prince from holders of such securities a balance of approximately one-third of the amount of the securities after deducting the liability of Prince therefrom (Trans., 72); in other words, that the amount of liability for which the deposits were made as security was approximately two-thirds of the amount of the securities. If the trades had been closed later in the day the liability of Prince would have been considerably more. (Trans., 73.) The parties were at liberty to introduce any evidence not inconsistent with the facts above admitted, but on the hearing Mr. Anderson, president of one of the defendants, testified that in his judgment very likely the whole of the securities

would have been wiped out in satisfying the liability of Prince to the holders, if the trades had not been transferred. (Trans., 62.)

Prince was in the bank every day after February 10th in conference with Mr. Castle, its vice-president. (Trans., 41.) On February 14th Mr. Castle called W. P. Anderson, president of W. P. Anderson & Co., also a member of the Board of Trade, to come to the bank, and there informed him that Prince was in financial difficulties and was about to quit business. Mr. Anderson was asked for advice in regard to the winding up of Prince's affairs on the Board of Trade. Castle believed Prince to be insolvent. (Trans., 42.) Anderson was requested to look into the matter of Prince's trades for the bank. He and his partner and Mr. Castle, the vice-president of the bank, and Mr. Scheidelhelm, the cashier of the bank, were down at the office of W. P. Anderson & Co. as late as 11:30 at night on February 14th. A list of Prince's trades had been furnished, and they were looked over, and Mr. Anderson informed Castle that it looked as if it was all right, and Mr. Castle requested him to take the trades over. (Trans., 51.) The trades showed that after charging commissions upon the transaction, required under the rules of the Board, there would be a small loss in the trades; Mr. Castle guaranteed W. P. Anderson & Co. that small loss. (Trans., 52.) The trades were transferred to Anderson & Co. the next day. Prince's open trades or time contracts were about even on the Board; that is, he had about the same number of bushels of various commodities bought as he had sold. Under an agreement between

the parties, W. P. Anderson & Co. immediately brought or sold enough on the Board to evenly balance the trades. Thereafter, Anderson & Co. settled the trades in their ordinary course of business, by collecting from various members of the Board the amounts that were due thereon, and by paying to other members of the Board the liabilities that had been Prince's thereon. At the time the trades were transferred Prince delivered to Anderson the certificates evidencing the margin deposits; Anderson secured their endorsement and delivered them to the bank on the same day that the petition in bankruptcy was filed. The bank thereupon applied the sums so deposited with it as a Board of Trade depository upon the debt of Prince to it as a bank, pursuant to an understanding with Prince and Anderson. (Trans., 41.)

The bill of complaint herein was filed against the bank and W. P. Anderson & Co., but was afterwards dismissed as to Anderson & Co. The bill charged that the transfer of the trades to Anderson, and the settlement by Anderson of the trades of the members who held securities, and the withdrawal of the securities from the escrow or trust under which they were held by the bank, as a Board of Trade Depository, and the application of the sums to the debt, had the effect of enabling the bank to obtain a greater percentage of its debt than other creditors of the same class, and that the bank had reasonable cause to believe that a preference was thereby intended. (Trans., 8, par. VII, VIII.) The prayer for relief in the bill contained a specific prayer that the transfer of the said time contracts

be decreed to be a fraud; that the application of the securities be decreed to be a preference, and a general prayer for all other proper relief; other relief prayed for in the bill is not here in question. Later an amendment to the bill was filed to recover the \$575.79 as a preference.

The court below held that the \$4,250 margins so deposited with the bank, as a Board of Trade depository, were not general deposits made under the law or customs of bankers, were not debts of the bank to Prince, but were special deposits (Trans., 94); that the deposits made after February 10th were not made in the usual course of business, but were made under such special circumstances that the appropriation of the balance of \$575.79 was a preference.

The master further found that

“The conduct of Prince’s affairs for the five days preceding the filing of the petition against him is of such a character as to exclude every other conclusion except that it was the intention of both Prince and Castle to reduce Prince’s indebtedness to the bank as much as possible, by applying thereon all his available assets and by so disposing of his open trades on the board as to realize the greatest possible amount for the bank to the exclusion of his other creditors. The transfer of the \$575.79, and the \$4,250 to the bank were made with knowledge on the part of the bank that Prince was insolvent, and with a view to use the amounts as set-offs against Prince’s indebtedness to the bank.” (Trans., 95.)

The court sustained this finding of the master.

A decree was entered against the bank for the

payment of the said sums, with interest at 5 per cent. from the date their payment was demanded by the trustee. All questions as to jurisdiction of an equity court to grant the relief were waived by agreement of the parties. (Trans., 100.)

The bank appealed to the Circuit Court of Appeals, where their counsel contended mainly, if not entirely, that the above deposits were made and carried on in the ordinary relation of debtor and creditor and were therefore a proper subject of set-off under Section 68 of the Bankruptcy Act.

We contend that the questions of law applicable to the admitted facts have been so plainly foreclosed by the decisions of this court that further argument is unnecessary, and warrants the conclusion that the further appeal to this court is taken for delay.

BRIEF.

A judgment will be affirmed on motion under Rule 6, Subdivision 5, where the questions urged for reversal have been so plainly foreclosed by decisions of the Supreme Court as to make further argument unnecessary.

Missouri Pac. Ry. v. Castle, 32 Sup. Ct. R. 606.

I.

THE TRANSFER OF THE BANKRUPT'S "OPEN TRADES" TO ANDERSON WAS AN INDIRECT TRANSFER OF HIS PROPERTY FOR THE BENEFIT OF THE BANK. THE TRANSFER OF THE AMOUNTS OF THE MARGIN SECURITIES HELD BY THE BANK AS A BOARD OF TRADE DEPOSITORY, TO THE BANK AS A CREDITOR, WAS A DIRECT TRANSFER BY WAY OF PAYMENT. THE DEPOSIT OF MORE THAN ENOUGH TO PAY THE SPECIFIED CHECKS UNDER THE SPECIAL DEPOSIT ARRANGEMENT WAS A PREFERENTIAL TRANSFER. A PREFERENTIAL TRANSFER INCLUDES EVERY MODE OF DEPOSING OF PROPERTY FOR THE BENEFIT OF A CREDITOR, AND CIRCUITY OF ARRANGEMENT WILL NOT AVAIL TO SAVE IT.

Nat. Bank of Newport v. Nat. Herkimer Co. Bank, 32 Sup. Ct. R. 633.

Western Tie & L. Co. v. Brown, 196 U. S. 502.

Trader's Nat. Bank v. Campbell, 14 Wall. 87.

II.

NO RIGHT OF SET-OFF EXISTED AS EITHER THE MARGIN
SECURITIES OR THE \$575.79 BECAUSE

(1) They were not deposits made in the regular course of banking business, creating the ordinary relation of debtor and creditor between the bank and the bankrupt, but were made "under special circumstances." They were special or trust deposits held by the bank as a trustee.

Western Tie & L. Co. v. Brown, 196 U. S. 502.

N. Y. County Nat. Bank v. Massey, 192 U. S. 138.

Yardley v. Philler, 167 U. S. 344, 359.

Scott v. Armstrong, 146 U. S. 499, 507.

Libby v. Hopkins, 104 U. S. 307.

(2) The alleged right of set-off was acquired by the bank on the day the petition was filed with a view to such use and with knowledge of insolvency.

Western Tie & L. Co. v. Brown, 196 U. S. 502.

Yardley v. Philler, 167 U. S. 344, 359.

Nat. Security Bank v. Butler, 129 U. S. 223.

ARGUMENT.

I.

AS TO PREFERENCES.

The law covering preferential transfers applicable to the admitted facts, is fully stated in *National Bank of Newport v. National Herkimer County Bank*, 32 Sup. Ct. Rep. 633, from which we quote as follows:

“To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than others of his creditors of the same class, circuity of arrangement will not avail to save it. A ‘transfer’ includes ‘the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.’ It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor’s claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The ‘accounts receivable’ of the debtor, that is, the amounts owing to him on open account, are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored cred-

itor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account,—the same to constitute a payment in whole or part of the latter's debt,—or he collects the amount and pays it over to his creditor directly. This implies that in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor.

But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. *Western Tie & L. Co. v. Brown*, 196 U. S. 502, 509; 49 L. Ed. 571, 574; 25 Sup. Ct. Rep. 289. 'These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor, and the consequent diminution of the bankrupt's estate.' *New York County National Bank v. Massey*, 192 U. S. 138, 147; 48 L. Ed. 380, 384; 24 Sup. Ct. Rep. 199."

AS TO THE MARGIN SECURITIES.

Prince's time contracts for the purchase and sale of grain, etc., otherwise known as his "open trades," were his assets and liabilities. Those trades or contracts which, according to the prevailing market price, showed a profit to him, were assets, and those that showed losses were his liabilities. His profitable trades were unquestionably "property" within the meaning of the bankruptcy law. It was found by the master upon the stipulated

facts that the value of his profitable trades was in excess of his liabilities on the other trades. The transfer of his trades to Anderson was a transfer of property. When Anderson collected the amounts due on the profitable trades and paid therefrom the liabilities on the other trades, there was necessarily a depletion or diminishment of Prince's estate. It did not diminish his *net* estate when part of his assets were applied in the payment of a like amount of his liabilities, but this is not the test of a preferential transfer. Any preferential transfer by way of payment or otherwise does not diminish the *net* estate. The proper test is whether the *gross* estate is depleted. The agreed facts show that the gross estate was depleted. The bank's knowledge of Prince's insolvency at the time of the transfer is not disputed. To bring the case within the law as above set forth, therefore, it remains only to determine whether or not the bank was benefited by the transfer.

The deposits of money or checks with the bank as security for the benefit of the members of the board, who demanded them, were unquestionably transfers within the meaning of the definition of "transfer" in the bankruptcy law. It is not these transfers, however, that are attacked in this proceeding. They were made in good faith before bankruptcy. It can hardly be questioned that the delivery of money to a depository to be held as security for a debt is a "transfer conditionally, by way of pledge, mortgage or security," to the person so secured. If Prince had transferred any property direct to the possession of another member of the board as security for

an obligation, it would be such a transfer, by way of pledge. It can make no difference that the transfer is to an agent or depository or escrow holder of the parties for the same purpose. He thereby parts with the possession of property by way of security. Prince did not have the right to demand the money from the bank after it had been so pledged or deposited with it. He could not have drawn checks against it, nor could he have maintained a suit at law for it. It was necessarily a conditional diminution of his estate to the amount so deposited. The rules of the Board of Trade regarding margins were enacted for no other purpose than to compel a member indebted to another to take out of his general assets, which general creditors might resort to, sufficient to secure a member desiring such security.

The transfer was not to the bank or for its benefit, but to or for the benefit of the secured Board of Trade member. The Board of Trade members whose claims against Prince were secured in this manner had a perfect right to look to the security in the event of Prince's default, and in accepting the benefit of the transfer to Anderson and in releasing their security on being paid by Anderson, they did not receive a preference.

The taking up of the securities and endorsing and delivering them to the bank was a transfer of property within meaning of the law. If we are correct in our assumption that the depositing of moneys as security for members of the board to whom Prince was indebted was a transfer, conditionally, by way of security, to such creditor, then it necessarily fol-

lows that, when Prince transferred the securities or deposits to the bank, as his creditor, by his voluntary action in turning the certificates over to Anderson, who delivered them to the bank pursuant to an understanding that this was to be done, there was a "transfer or parting with property absolutely, by way of payment." The fact that the deposits were payable upon return of the certificates duly endorsed by the president of the board, or both parties, was merely a convenient method of transferring the deposit or security to the person entitled thereto. The legal effect of the transaction, under which the certificates were turned over to Mr. Anderson, and by him delivered to the bank for credit on Prince's debt, was the same as if Prince and the secured parties had executed a formal assignment of all their right, title and interest to the sums deposited and had directed their payment on Prince's debt. The certificates were payable only on the return of the same, or duplicate, duly endorsed by both parties, or by the president, etc. Anderson testified (Trans., 56) that when the trades were transferred the margins were endorsed and by him handed to the bank. The bank did not rely upon a right of set-off. It was an active agent in inducing a transfer of the trades; the certificates were delivered to Anderson as a part of the transaction; the bank accepted the certificates from Anderson as representative of Prince, and credited the amount on its debt as a payment.

Even if the deposits made by Prince had been of the kind commonly evidenced by ordinary certificates of deposit, or promissory notes of the banker, payable on demand, which were being held by an-

other as security, and the bank through collusion had induced the bankrupt to pay the holder of the certificates, so that the bankrupt himself again became possessed of them, and had induced him to deliver the certificates of deposit for payment on its debt, the transaction would have come fully within the rule laid down in *Traders Bank v. Campbell*, 14 Wall. 87. In that case the bank held a judgment note of the bankrupt and the bankrupt had \$335.25 on deposit. The court say:

“Before the bank caused the judgment to be entered up they credited this amount on the note and took judgment for that much less. They now assert that this was what they had a right to do and that it should remain a valid set-off. But this does not appear really what was done. It appears that Hitchcock & Endicott gave the bank a check for the sum, and by virtue of that check it was endorsed on the note as payment. Now as both the bank and the bankrupts knew of the insolvency of the latter, this was a payment by way of preference and therefore void by the 35th section of the bankrupt act. In this case as in the other, if they had stood on their right of set-off, it might possibly have been available, but when they treat it as the bankrupts' property, and endeavor to secure an illegal preference by getting the bankrupts to make a payment in the one case, and seizing it by execution in the other, when they knew of the insolvency, both appropriations are void.”

It takes two parties to accomplish an effectual payment, both a payor and a payee. One party alone can exercise the right of set-off without the consent or assistance of the other.

In the case at bar when Prince transferred his trades to Anderson, and endorsed and delivered to him the margin certificates, with the understanding that they were to be delivered by Anderson to the bank to apply on his debt, there were two parties to the transaction, Prince, as debtor, and the bank, as creditor. Prince became a payor and was a voluntary party to the transfer of his funds to the bank. It could not have been done without his consent and assistance.

Ridge Ave. Bank v. Studheim, 145 Federal 798, decided by the Circuit Court of Appeals for the Third Circuit, applied the law in the same way as was done in the case of *Traders Bank v. Campbell*. The same contention was made there as is made here. The bankrupt, while known by the bank to be insolvent, gave a check against his account with the bank, in part payment of a debt to the bank. The trustee sued to recover as a preference. Counsel for the bank stated that they claimed right of set-off, as here. The court say:

“The mere reading of this statement, however, shows it is inapplicable to the case at bar. This is not the case of a deposit remaining to the credit of a bankrupt estate at the time of the filing of a petition of bankruptcy, which, under certain circumstances, and in the absence of collusion, might be the subject of set-off, but is rather that of a transfer to a bank of a portion of the bankrupt's estate by the bankrupt's own act, prior to the bankruptcy, and which was accepted by the bank in partial payment of an unmatured claim, and concerning which transaction the jury has said the bank had reasonable cause to believe at the time the pay-

ment was made, that it was accepting preference. It seems wholly unnecessary to add anything further on this point."

In *Bank v. Massey*, the court cited *Traders Bank v. Campbell*, and distinguished it, but did not criticize it.

In the case at bar Prince's voluntary action in endorsing the certificates over to Anderson for delivery to the bank by way of payment, and their acceptance of the same, and applying the amounts on the debt before the petition was filed, is of the same legal effect as the drawing of a check against a checking account, and comes squarely within the reason of the foregoing cases.

Anderson & Company did not receive any benefit from the transfer beyond the incidental benefit of a nominal commission provided by the rules of the Board of Trade for making the transfer. They paid over whatever they received on Prince's profitable trades to the members to whom Prince was liable and who held securities. They were merely acting as Prince's representative in making the transfer. No recovery could be had against them. The bank alone was benefited by the transfer.

The finding of the master that the transfer of the trades to Anderson was doubtless the best plan that could have been adopted to avoid serious loss to Prince and his creditors, and that a panic *might* have ensued on the board if it had not been done, and that the margin securities would have been lost to Prince and his creditors, has no bearing on the liability growing out of what *actually* happened.

What *might* have happened is pure conjecture. What would have happened to the margin securities if no transfer had been made is of no interest.

This finding, however, is not tantamount to saying that there was no diminution of Prince's estate. While all the margin certificates, under the stipulated facts, would have been lost, or, in other words, while Prince owed to the members of the board holding margin securities as much or more than the amount of the securities, and they would have been compelled to exhaust all the securities, there is no finding that the profits on those trades that were profitable to Prince,—which were his assets,—would have been wiped out or lost. On the contrary, the stipulated facts show that Anderson collected sufficient from those profitable contracts to pay in full the indebtedness of Prince to those members who held the securities. The sums that were due to Prince on his open trades were not due from the same members to whom Prince was indebted, but such sums were due to him from *other* members of the board. Therefore, the bankrupt's estate was diminished to the extent of the value of the profitable trades, and was benefited to the extent that, by exercising his right to redeem the margin securities, his estate was placed in position to demand back the securities previously pledged for the benefit of the members of the board who held them, and was again depleted when he transferred the margin deposits to the bank as a payment.

Leaving the bank out of consideration for the moment, and assuming that it had not been a creditor

of Prince, and had had nothing to gain one way or the other in the transaction, then Prince, in closing up his affairs on the Board of Trade, for his own benefit, and that of his creditors generally, was free to follow either of two desirable courses: First, he could transfer his profitable trades and receive the consideration therefor, leaving the other members of the board to whom he was indebted, including those who held securities, to collect the amounts due them either from their securities or by filing claim in the bankruptcy court. It was entirely feasible, as well as legitimate and proper, for him to have transferred his profitable trades only. Second, if the margin securities amounted to as much or more than the profits due him on his profitable trades, then, to save the deposits he could transfer *all* his trades, that is, profitable trades, for the purpose of paying therefrom his liabilities on other trades, and thus again become entitled to the deposits. In either event there would necessarily be a transfer of some of his property. If he had transferred the proceeds of the sale in the first instance to the bank, its character as a preference would be admitted. In the second instance, the form of the transaction is somewhat changed, but the effect is the same.

There is no evidence in the record that the possibility of a panic resulting from Prince's failure was talked of at the time the transfer was made. The only reference to a panic is an irresponsive suggestion offered by Anderson on examination that certain conditions *might* have obtained, the importance of Prince's transactions *might* have been exaggerated, and as a result a panic *might* have followed.

(Trans., 62.) It was not to avoid a panic that the transfer was made, but solely, or at least principally, to enable the bank to apply the margin securities. Castle, the bank's vice president, was asked (Trans., 41), "Had you agreed with Mr. Prince at the time you undertook the closing out of the trades, proceeds of the sale would be paid to the bank?" He replied, "I didn't understand any agreement was necessary; we expected him to do that, certainly." That such was the intention of the parties was demonstrated by their actions.

Anderson accepted the transfer of Prince's trades after he found that there was profit enough or nearly enough in some of them to pay the losses on the others, including those who held securities. The bank knew all the circumstances, it requested Anderson to take the transfer, and even guaranteed him against a loss, should there be any. Under the agreed facts, it is entirely immaterial what might or would have occurred if the transfer had not been made. An insolvent merchant about to go into bankruptcy might sell out his entire business at its actual value as a going concern, whereas if sold after bankruptcy, it would be sold at a great loss. However, if out of the proceeds of such sale any particular class of creditors were favored by the purchaser assuming and paying the debts as a part of the purchase price, it would be a preference, notwithstanding the advantageous effect of the transaction in other particulars.

AS TO THE \$575.79.

The stipulated facts show that the bank agreed to pay certain specified checks, the amounts of which are set forth in the stipulation, if Prince would *thereafter* make deposits of sufficient funds to cover same. The deposits were not made until after the checks had been paid. Other checks, except those specified, were refused payment by the bank. The exact amount that he was obliged to deposit under his agreement was readily ascertainable. In view of the fact that Prince was so hopelessly insolvent that the trustee, as shown by the stipulation of facts, has not enough on hand to pay even wage claims, we do not think that the bank ought to be permitted to profit by the over-payment on the theory that it was merely an accident, or mistake in addition, on the part of Prince, as suggested on the argument below. There is no evidence to bear out the suggestion. Prince, in fact, did deposit a larger sum of money than was necessary to pay these checks, and he cannot be heard to say that he did not intend to do so, and as the necessary consequence of the act was to enable the bank to receive a larger portion of its debt than other creditors, the law conclusively finds it to be a preference. When the bank is permitted to retain the amount of Prince's general checking balance, which was applied on February 10th, it had all the advantage it was entitled to under the rule announced in *Bank v. Massey*. That case should not be extended beyond the reasons given for its decision.

The bank had appropriated the balance due on

his general deposit account, and he thereafter had no general account. He simply agreed to deposit enough money to pay certain specified checks. He was not under obligation to deposit any more than sufficient for that purpose, and had no right to deposit more, when his other checks previously drawn were refused payment by the bank, thus showing that he did not have control over amounts deposited by him, such as is the case in a general deposit account. The amounts brought in by him were not entered to his credit on the books of the bank when they were received by the bank, but were held by the bank as cash items, so that his account during the several days immediately preceding the failure showed a continual overdraft. The case of *Bank v. Massey*, specifically excepts from the scope of its decision deposits made "under special circumstances." If the bankrupt under these particular circumstances and under this special arrangement, could deposit \$575 more than enough to pay the specified checks, he could so deposit \$5,000. The necessary result of the transaction was to transfer the amount stated from Prince to the bank, and necessarily was a preference. Counsel contended that there was no intent on the part of Prince or the bank to create a preference by this special arrangement. The necessary effect of the transaction was that the bank, by the depositing of the excess over the amount of the checks, got a greater percentage of its debt than other creditors. Where the transaction has that effect, and the party receiving the benefit of it has knowledge of the insolvency, then the law will conclusively presume that he intended the necessary

consequences of his act, and he cannot be heard to say that he did not so intend it. The case of *Western Tie Co. v. Brown*, is conclusive on this point. The court there say:

“If Harrison, being insolvent to the knowledge of the company, within the prescribed period gave to the Tie Company authority to collect the sums due to him from the laborers for goods sold them, with the right or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intent to bring out the result necessarily arising from the nature of the act which he did.”

On the day before the petition in bankruptcy was filed Prince made two deposits, the first of \$820, and the second of \$499. The first was more than enough to cover the checks paid. The bank was, on that day, making strenuous efforts to shape the bankrupt's affairs to its own advantage. It knew that a petition in bankruptcy was being prepared. That the transfer of the money to the bank, under these circumstances, took the form of a deposit in a bank account that had already been foreclosed by the bank only four days previously, and against which checks previously drawn were being dishonored, cannot avail to change its character as a preferential transfer.

II.

AS TO THE RIGHT OF SET-OFF.

Practically the only contention of the bank's counsel was that, notwithstanding the circumstances under which the margin securities and the \$575.79 were applied in payment of its debt, the bank now has the right of set-off against its debt. This point has been settled beyond controversy by previous decisions of this court.

If the transfer of the margin securities held by the bank as a Board of Trade depository to the bank as a creditor, and the transfer of the \$575.79 by way of deposit, were preferential transfers, the sums so received as payments cannot be retained as a set-off.

But even though no preferences were involved, there could be no set-off, either as to the margin securities or the \$575.79, under the rule announced in *Western Tie & L. Co. v. Brown*, 196 U. S. 502.

AS TO THE MARGIN DEPOSITS.

The Federal Trust and Savings Bank sustained a dual relation in these transactions. It was a banking institution sustaining the relation of banker and depositor, or debtor and creditor, as to Prince, on his general checking account with it. The other relation was that of a Board of Trade depository, which was a trust or fiduciary relation, and not a relation of debtor and creditor. The mere fact that the depository selected by the members of the Board of

Trade happened to be at the same time a banking institution would not change the relation growing out of these margin deposits into that of banker and depositor or debtor and creditor. No one would contend that if these margin deposits had been deposited with the treasurer of the Board of Trade, instead of a bank, as was permissible under the rules of the Board, the treasurer of the Board of Trade would have had a right to use the funds as his own or as those of the Board of Trade. The relation of debtor and creditor would not have been established by such a transaction. Whatever institution or individual held deposits made under the rules of the Board of Trade, held them as a depository or trustee, or agent, and not as a debtor.

In *People v. City Bank of Rochester*, 96 N. Y. 32, the court recognizes that a banker may sustain a dual relation in regard to funds in its possession, the court saying:

“The transaction in question was not between the bank and Sartwell in their relation of debtor and creditor, nor in their relation of bank and depositor. The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus was a trust created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled.” (Citing *Libby v. Hopkins*, 104 U. S. 303.)

“The checks of petitioner were money assets in the hands of the bank, and were so treated by all parties. They were delivered to it with explicit directions to apply the proceeds on the payment of the notes. These directions were assented to by the bank officials and the checks

collected from the general funds. From that moment the bank was bound to hold the money for and apply it to that purpose and no other, or failing to do so, return it to the petitioner. As to it, the bank was bailee or trustee, but never owner."

In a similar case in *Peak v. Ellicott*, 30 Kas. 156, the court says:

"When the bank, through its cashier, accepted the \$782.50, it was not paid by plaintiff as a deposit, nor accepted by the latter as a deposit, nor was the relation of debtor and creditor between the bank and plaintiff created by the transaction. On the other hand, as respecting this specific sum, the relations between the parties must be regarded as that of principal and agent. After the bank received this sum to satisfy the note of the plaintiff the bank held the money in a fiduciary capacity; if the money was not applied according to the understanding of the parties to the satisfaction of the note, it should have been returned to the plaintiff. It was not deposited to be checked out or to be loaned, or otherwise used by the bank; in law the bank held it as a trust fund and not as assets of the bank."

The margin certificates evidencing the agreement under which deposits were made, were the certificates of the bank in its relation as a Board of Trade depository, and not as a banking institution. The deposits were not made as a loan to the bank, and were not made according to usages and customs of banking institutions. It is conceded that the deposits created no relation of debtor and creditor between the bank and Prince at the time they were made; the certificates recite that the deposits were made *as security* for contracts between depositor

and another member of the Board of Trade, payable when endorsed, "*as provided by the rules of the Board of Trade, under which the above named deposit has been made*"; the rules of the Board of Trade were thus made by reference a part of the agreement between the bank and the other parties to the agreement. As further indicating that the relation was in no sense of banker and depositor, but that the relation of the bank was that of a depository, or trustee, the bank gave its bond with sureties reciting that it had been appointed a Board of Trade depository and conditioned for the proper deposition of such securities, in accordance with the rules, regulations and by-laws of the association. We think it must be conceded that as to these margin deposits the bank had no greater right than any other trustee or agent dealing with a principal's property. The mere fact that the depository was at the same time a banking institution certainly did not give it a right to mingle such trust funds with its general assets as a bank. The deposits were not loaned to the bank to be used by the bank as it saw fit along with its own resources, but were left with the bank as security and it was the duty of the bank to keep the funds intact for that purpose.

If these deposits were moneys transferred or deposited as security, so far as the other members of the Board were concerned, they certainly were of the same character as far as Prince was concerned, and as far as the bank was concerned. When the other parties to the secured contracts were satisfied, Prince had a right to demand back, not moneys loaned by him to the bank as a general deposit, but

sums specially deposited as security. The deposits never changed their character as security. They were put there as a trust fund, and they were payable as a trust fund.

If the margin certificates had been presented for payment by members of the board to whom they were given as evidence of the deposits for their security, the obligation of the bank would have been that of a trustee or depository, and not that of a debtor. On the other hand, if they had been presented by Prince or by his trustee, duly endorsed, the obligation of the bank would still be that of a depository or trustee or agent to return the special deposit, and not that of a debtor to a creditor, or a banker to its depositor.

In *Moreland v. Brown*, 86 Fed. 257, the Court of Appeals for the Ninth Circuit held that a deposit in a bank, with directions to pay it to a named person, was a special deposit; that the title to the deposit was not in the bank, but in the payee, and that he was entitled to recover it in full from the receiver of the bank. The court also recognized the rule that if the title had not passed to the payee, it would have remained in the depositor, and he could have recovered it.

In *Bolles on Banking*, Section 3, deposits are characterized under two heads: general and special. He defines a general deposit as a loan made to the bank for convenience in business, subject to be demanded at any time in any amount. He subdivides special deposits into two distinct classes: First,

“those kept gratuitously and delivered by request of owner; second, those which are to be

applied in a specific manner, like money deposited for discharging an obligation payable at the depository. The second kind of special deposits includes all which are held by the bank as agent, trustee, or any other fiduciary relation; in short, all except those held by the bank as debtor of the depositor."

Morse on Banking subdivides deposits into three classes (Section 185 *et seq.*). The first is the *general* deposit; the second is *special* deposit, where the identical money or property is to be returned; and, third, the *specific* deposit, which he defines as follows:

"When money is deposited to pay a specified check drawn or to be drawn, or for any other purpose than mere safe keeping or entry on general account, it is a *specific* deposit, and the title remains in the depositor until the bank pays the person for whom it was intended, or promises to pay it to him."

The distinction is clearly pointed out in a case almost identical with the case at bar in *Woodhouse v. Crandall*, 197 Ill. 104. Woodhouse leased certain premises to Furlong, who deposited \$1,500 with a bank as security for the payment of rent. The bank executed a receipt reciting that it had received the sum of \$1,500 from Furlong to be held as security for the performance of the covenants of said lease. The money was mingled with the funds of the bank, which afterwards became insolvent. It was held (p. 112) that

"it makes no difference on the question of the identity that the fund was mingled with other moneys of the bank."



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The court further held:

"The transaction in this case was not a mere bailment for the safe keeping of a package of money for Furlong, where the identical thing was to be returned to him as a depositor, and it was not a deposit to the general account of the depositor, Furlong or Woodhouse. The receipt specifies the terms and conditions of the deposit, and shows that it was not for entry on the general account of either of the parties. In the case of a general deposit with a bank to the credit of the depositor, the relation created is not that of principal and agent or of trustee and *cestui que trust*, but is that of debtor and creditor. Such deposits belong to the bank, and become a part of its general funds, and there is nothing but a liability as debtor to repay according to the customs and usages of the business. This deposit was for a specific purpose, for the benefit and security of a third person (Charles F. Woodhouse) and it created a trust relation in his favor. The banking firm assumed the position of a trustee, and the money deposited constituted a trust fund, which the bank was bound to keep intact for the purpose of the trust. The obligation of the bank was to preserve the sum of \$1,500 as a trust fund for the person mentioned in the receipt and to apply it to the purposes therein specified, and the title to such trust fund did not pass to the bank as a part of the general funds of the firm. The certificate of deposit was made and attached to the receipt merely for the purpose of identifying and following the fund and showing where it had been put. That was to conform to the plan of keeping books adopted by the bank, and the system of book-keeping by the trustee could not affect the substantial rights of the beneficiaries."

In *Shopert v. Indiana State Bank*, 83 N. E. 515, where money was deposited in the bank as security for the payment of a shredder machine, to be paid to the seller if the machine was satisfactory and to be repaid to the depositor otherwise, the court held it a special deposit, although the depositor did not understand that he was to get back the identical money deposited. The court said:

“In case of a special deposit, the bank is merely a trustee or bailee, the property right being in the depositor, and the relation of debtor and creditor is not thereby created. But a general deposit vests the property in the bank and establishes the relation of debtor and creditor. Clearly this was not a general deposit; it was a specific sum for a specific purpose, the payee determinable after the lapse of a specific time and the happening of a specific contingency. After the bank had delivered to the appellant the bill of lading for the machine, the bank could not rightfully deliver the money, either to the appellant or to the shredder company until the contingency was determined. Under these conditions, the bank had no right of profit in it, and could not invest itself with this right by any act of its own without the knowledge and consent of the party or parties who had such interest.”

In *Woodhouse v. Crandall* the decision was not based on the theory that the transaction was a special deposit of moneys to be kept and returned *in specie*; but that where the money was deposited for a *particular purpose* the relation of debtor and creditor was not established. It is immaterial whether the identical moneys deposited are mingled with the general moneys of the bank. All that is important is that the identity of the *fund*, as distinguished

from the particular pieces of money, should be preserved. On page 111 the court in that case say:

“The material question in this case, therefore, is whether the trust fund deposited by Furlong can be traced and identified; and upon that question the law is well settled that it is not necessary the money or the bank bills should be identified. The suit is not to recover a specific thing, such as particular pieces of money or bills, but a certain sum of money held in trust, and it is the identity of the fund and not the identity of the money or currency which is to be established.”

No question arises in this case making the question of the identity of the fund of importance, but notwithstanding, its identity was preserved and such funds were identified in a particular account separate from the general accounts of the bank.

“A bank has no lien or right of set-off against special deposits or money deposited for a specific purpose, as for collateral security or for the payment of a particular debt.”

3 A. & E. Encl. Law, 2d Edition, 822, 837.
5 Cyc. 552.

Morse on Banking, Section 325.

In *Reynes v. Dumont*, 130 U. S. 354, it is held that a bank's lien rests upon the presumption of credit extended in faith of securities in possession, and does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien.

A case on the right to set-off under the present bankruptcy law arose in *Wagner v. Citizens' Trust Co.*, 122 S. W. 245. The court, after pointing out that the section of the present bankruptcy law on set-off is almost a literal reproduction of a section from the Act of 1867, quotes *Sawyer v. Hoag*, 17 Wall. 610, as follows:

"This section was not intended to enlarge the doctrine of set-off in cases where the principle of legal or equitable set-off did not previously authorize it."

The court, after announcing the general rule regarding set-off of deposits, says:

"The right of a bank to apply deposits to the extinguishment of a depositor's indebtedness as it matures, grows out of the doctrine that the relation between the bank and the depositor is that of debtor and creditor, but it is well settled that the bank does not have a lien upon special deposits or moneys deposited for a specific purpose, as for collateral security or for the payment of a particular debt."

The court comments upon the case of *Bank v. Massey*, as follows:

"But in that case the facts did not show a deposit for a special purpose with the knowledge and consent of the bank, but only a deposit in the ordinary course of business. In such cases the authorities are uniform that the bank has the right to set off its notes against the deposit."

In *Smith v. Sanborn State Bank*, 126 N. W. 779, the court lays down the rule as to set-off of a deposit as follows:

"Of the general rule that a bank to whom a depositor is owing a matured indebtedness may

appropriate the general deposit of its debtor to the discharge of the obligation, there can be no doubt; but it is no less certain that a deposit made for a specific purpose or under a specific agreement cannot rightfully be so appropriated."

In *Dolph v. Cross*, 133 N. W. 669, a fund was deposited in a bank to meet the payment of certain checks already drawn. The bank was informed of the purpose of the deposit. The bank was garnished by a judgment debtor of the depositor. The court said:

"The facts pleaded show that the execution defendant made the deposit for the specific purpose of meeting the checks which he had just issued, and this fact was made known to the bank officials at the time of the deposit. The form of book-keeping was not controlling; that was a mere matter of convenience. The bank officials understood that they received this money for the expressed purpose of paying checks already issued for that exact amount. Whether the facts pleaded show an equitable assignment to the check holder we need not determine. The deposit was specific, not general. It was made for the benefit of the particular check holders. The bank received it as such. It is enough to say that the contract of deposit was for the benefit of the third parties and that such third parties are entitled to avail themselves of it. If the bank itself had been a creditor of the depositor, it could not have applied such deposits upon its own claim. We see no reason for holding the right of the garnishing creditor could rise any higher than that of the bank itself if it were a creditor. * * * The bank, having received the deposit for such specific purpose, was bound by the conditions imposed. (Citing *Smith v. Sanford State Bank*, *supra*.)

We reached the conclusion that the deposit in question was special, and not general, and that it did not create the mere relation of debtor and creditor."

In re Davis, 119 Fed. 950, the court say:

"While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when a deposit is made for a special purpose, as, for example, to be paid to creditors, as here. In the latter case a fiduciary relation is created and the money is held as a trust fund, not as bank assets, and hence the bank is without lawful right to apply it to its own use."

In *Western Tie Co. v. Brown*, your Honors held that although there was no question but that the Tie Company was indebted to the bankrupt for the amount collected from its employes, yet there was no right to set-off, because the debt due from the Tie Company to the bankrupt for the deductions was not a "mutual debt or mutual credit." The court say:

"It follows as to such deductions the Tie Company stood towards Harrison in the relation of trustee, and therefore the case was not one of mutual credits and debits within the meaning of the set-off clause of the bankruptcy law."

The case of *Scott v. Armstrong*, 146 U. S. 499, 507, is also authority for the proposition that even if the relation of debtor and creditor was established by the transaction between the bank and Prince, yet it was not of the class known as mutual debts or credits. It cannot be said in this case that the bank extended any credit to Prince, founded on

and trusting to a debt due by it to Prince on margin securities as means of discharging it.

In *Libby v. Hopkins*, 104 U. S. 307, mutual credits are defined to mean only such as must in their nature terminate in debts. The court says:

"The fact that he gave the direction imposed on plaintiff the obligation to apply the money as directed or return it to him. They had no better right to refuse to make the application and to reclaim the money and set it off against the debt due to them from Hopkins than if they had been directed to pay the money on the debt of him to another of his creditors, or than they had to apply to the payment of his debt to them money which he had left with them as a special deposit."

Distinguishing a deposit, the court further says:

"The relation of banking and depositor did not arise, consequently there was no debt. When A sends money to B with directions to apply it on a debt from him to B, it cannot be construed as a deposit, even though B may be a banker."

The court further holds in the *Libby* case that credits and debits are correlative terms; that what is a debt on one side is a credit on the other; that "credit" does not include "trusts"; that there must be *mutual* credits or debits to authorize set-off; that remitting money to be applied would not make the party receiving it a debtor, but a trustee.

In *Gray v. Rollo*, 18 Wall. 632, in discussing the right of set-off in bankruptcy, the court say:

"Neither transaction was entered into in consequence of or in reliance on the other; and no agreement was ever made that one claim should

stand against the other, there being neither mutual credits or mutual debts, the case does not come within the terms of the bankrupt law."

The above case was cited with approval in *Munger v. Albany City Bank*, 85 N. Y. 589. This was a case in which one of the points involved a construction of the section of the bankruptcy law regarding set-off of mutual debts and mutual credits. On this point the facts were that the plaintiff was indebted to a Rochester bank on his promissory notes, and had made a deposit therein, and received therefor a negotiable certificate of deposit payable on demand. The Rochester bank sold the notes to the Albany City Bank and went into bankruptcy before the certificate of deposits had been presented for payment. The court says:

"It is clear that there were not, when the Rochester Bank became insolvent and was put into bankruptcy, mutual credits existing between it and plaintiff. There was no connection between the credit for the deposit and the credit for the sum loaned on the discount of the note. * * * There is no finding, no proof, there can be no inference that the discount of the first note for the plaintiff, and the renewals of it by the Rochester Bank were made in dependence upon or in view of the deposit made by him with the bank, or that he made the deposit in expectation of a discount, or for the purpose of getting it, or as a means of security for the payment of it. There is no connection between the two acts and no mutual credit for either was entered into in consequence or in reliance upon the other, and no agreement was made that one should stand against the other. Apart from the bankruptcy act, and the interpretation of it by the Federal Judiciary, it

seems that a mutual credit is a knowledge on both sides of an existing debt due to one party and a credit to the other party founded on and trusting to that debt as a means of discharging it."

In *Rawleigh v. Rawleigh*, 35 Ill. 512, the court points out that a right of set-off exists in equity where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or off-set of the other, and that there must at least be sufficient to show that the credit was given under circumstances warranting the conclusion that the parties acted upon the understanding that one demand should be applied in liquidation or set-off of the other.

In the case at bar, the undertaking of the bank to hold the funds as security for trades under the rules of the Board of Trade was inconsistent with and precludes the contention that there was any such implied understanding as to set-off. There was no connection whatever between the loaning of the money by the bank to Prince and the deposit of the margin securities with the bank as a Board of Trade depository.

AS TO THE \$575.79.

If a fair interpretation of the stipulation of facts regarding the special deposit arrangement entered into on February 10, 1905, warrants the conclusion that the deposits were made before the specified checks were paid, the position of the bank is not benefited, under the authorities above quoted.

The deposit of sums of money to pay particular checks, and against which it is agreed that other checks shall not be paid, comes within the definition previously given of specific deposits, and for that reason, if for no other, there would be no right of set-off. The refusal of the bank to honor any checks presented against Prince's account, except the checks specified in the special arrangement, takes it out of the category of a general deposit, which is defined in the authorities to be simply a loan to the bank for convenience in business, subject to be demanded in any amount at any time. If there were other salary checks issued by Prince in amount sufficient to use up the \$575.79, which the bank would have been bound, under its agreement, to pay if presented, then certainly there was no right of set-off, as such a right would be inconsistent with the agreed duty of the bank to pay the specified checks. It is admitted that the bank refused to pay checks that were not salary and other agreed checks between February 10th and 14th. If there were other salary checks outstanding, for payment of which this fund was deposited, then the trustee is entitled to recover it for their use and the use of other wage claimants.

This arrangement would make the bank a trustee of the funds so deposited for that particular purpose and under the decision in *Western Tie Company v. Brown* there could be no set-off. In *Germania Savings Bank v. Loeb*, 188 Fed. 285, decided by the Sixth Circuit Court of Appeals, the proposition is recognized that the existence of an agreement that the depositor of deposits under such a special agreement, giving the depositor the right to draw out all

new deposits, would make the bank a trustee, and deny it the right of set-off.

AS TO THE APPLICATION OF SECTION 68B.

Although the question is not necessarily involved in the decision of this case, yet the right of set-off does not exist, because whatever right exists was acquired in violation of Section 68B of the Bankruptcy Act, which forbids the transferring of a set-off with a view to such use. The case is squarely within the rule as disclosed in *Western Tie & L. Co. v. Brown*.

Counsel for the appellant contended that this section was intended to apply only where a *debtor* of the bankrupt purchased a claim against the bankrupt for the purposes of set-off. It would be contrary to the spirit of the bankruptcy law, and in effect nullify its aim to secure equal distribution of assets among creditors, if such a narrow construction should be adopted. The word "debtor" is used as designating the party as of the time that the right to set-off is claimed, which is after a party sustains both the relation of debtor and creditor of the bankrupt. The meaning and operation of the section would have been the same if the word "creditor" had been used instead of "debtor." In every case of set-off of mutual debts or mutual credits, each party to the transaction is both debtor and creditor to the other person. What difference does it make, in case of a claim to set-off mutual debts and credits, which was created first, the debt or the credit? The principle that "*Equity is Equality*" underlies

the whole bankruptcy law, and it is as applicable where the debt to the bankrupt is transferred to the creditor as in the reverse case. For illustration: A is indebted to B for \$1,000 and is insolvent to the knowledge of B. B knows he cannot take a transfer of property from A or receive a payment in money without thereby creating a preference. Suppose, however, that with knowledge of the insolvency, and with a view to using the claim as a set-off, B buys from A \$1,000 worth of goods, and a bill therefor is rendered. There would now exist a case of mutual debts and mutual credits, where the debt to the bankrupt or the credit in favor of the bankrupt on the books of B was transferred to or acquired by B within four months of the bankruptcy, and with a view to a set-off against the debt due from the bankrupt. B became a debtor of the bankrupt and was at the same time a creditor. It is a mere matter of the choice of words whether you say B claimed the right to set-off the \$1,000 debt due from B for goods purchased from A, against the \$1,000 credit due to B; or whether you say they set-off the \$1,000 credit against the \$1,000 debt. As applied to the concrete case at bar the section should read that a set-off or counter-claim shall not be allowed in favor of the Federal Trust and Savings Bank (whether denominated debtor or creditor is immaterial), which was purchased by or transferred to it within four months, etc., with a view to such use. Of course, it makes no difference whether the set-off or counter-claim is transferred directly from the bankrupt to his debtor or creditor, as the case may be, or whether a debt or credit in favor of a third person

is transferred to the debtor or creditor. The result is necessarily the same. *Tie Company v. Brown* flatly applies the section under consideration in the same manner as we seek to apply it here. It was not a case of the debtor of the bankrupt buying up claims against the bankrupt, but a creditor, as here, who became a debtor of the bankrupt, and sought to set off that debt against the credit, or the credit against the debt, whichever way you choose to term it.

The case of *National Security Bank v. Butler*, 129 U. S. 223, presents a similar question arising under the National Banking Act. There, after a bank had become insolvent and decided to liquidate, it deposited in the National Security Bank checks amounting to about \$11,000, and received therefor a certificate of deposit. The National Security Bank was at the time a creditor of the insolvent bank. The effect of the deposit and receipt of the certificate was to make the Security Bank the debtor of the insolvent bank. That is precisely the situation which counsel contended was created by the transfer of the trades and the surrender of the margin certificates in the case at bar. The receiver of the insolvent bank sued the Security Bank and the Security Bank attempted to set off the amount of its debt on the certificate of deposit. It was held that it could not do so, as the transaction amounted to a preference.

Another case similar in principle is *Yardley v. Philler*, 167 U. S. 344, 359. Here the insolvent bank was indebted to the Clearing House Association in a large sum for loan certificates. The insolvent bank had sent to the Clearing House Association

about \$28,000 worth of checks on other banks for the purpose of making its daily clearing. The other banks had sent a larger amount of checks drawn on the insolvent bank to the Clearing House Association for the same purpose. Upon the insolvency of the bank, all the checks the clearing house had against it were returned to the respective banks which presented them. This left a credit on the books of the Clearing House Association in favor of the insolvent bank of \$28,000. The Clearing House Association sought to apply this amount on the debt to it from the insolvent bank by way of set-off. The court held that the clearing house held the said sum as an agent and fiduciary representative of the insolvent bank, and that its appropriation of the sum so held as fiduciary agent upon the debt of the bank to it was obviously a preference. The court further held that regardless of the question of the want of a lien or of all questions of fiduciary relation, and considering the matter solely on the general principles of the law of set-off, it could not be allowed, because the situation in which the credit on its books to the insolvent bank was brought about was created *after* knowledge of the insolvency had been brought to the Clearing House Association, and that the right to set-off must be determined by the state of things existing at the moment of the insolvency and not by conditions thereafter created.

In *Bank v. Massey*, chiefly relied on by appellant, the language of the court expressly limits the application of the rule laid down to a deposit of money *upon general account* which creates the relation of

debtor and creditor, and excludes specifically deposits that might be made "under special circumstances," and says that "the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits." As a matter of fact in that case checks were actually honored against the deposit after it was made. In the latter part of the opinion it is also said:

"There is nothing in the findings to show fraud or collusion between the bankrupt and bank with a view to create the preferential transfer of the bankrupt's property to the bank and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

But the master in the case at bar found from the stipulated and undisputed facts that "every other conclusion was excluded" except that it was the intention of both Prince and the bank to apply his assets to the greatest possible advantage of the bank and to the exclusion of his other creditors, and that the transfer of the \$575.79 and the margin securities was with knowledge of insolvency and with a view to use the amounts as set-offs against his indebtedness to the bank.

In view of this we submit that no further argument is necessary to demonstrate that this case is not within the rule announced in *N. Y. County Bank v. Massey*, but is governed by *Western Tie & L. Co. v. Brown*. The question as to the right of set-off has been so plainly foreclosed by those decisions that the conclusion is obvious that this appeal is for delay.

Counsel for appellant have refused to expedite a decision by submitting the case on printed arguments under Rule 20. The settlement of this bankrupt estate, in which not even wage claims can be paid until this appeal is determined, ought not to be delayed for the two or three years it will take to reach the case on the regular calendar, where the only question urged for reversal has already been so completely settled by the court. We therefore respectfully submit that the motion to affirm should be sustained.

Respectfully submitted.

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, JR.,
Counsel for Appellee.



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No. 741.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1912.

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy
of EARL H. PRINCE,

Appellee.

APPEAL FROM CIRCUIT COURT OF APPEALS, SEVENTH DISTRICT.

Motion to Affirm, Notice and Proof of Service.

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, Jr.,

ATTORNEYS FOR APPELLEE.

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Bankruptcy of EARL H. PRINCE,

Appellee.

APPEAL FROM CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

— — — — —
**MOTION TO AFFIRM, NOTICE AND PROOF
OF SERVICE.**
— — — — —

Now comes the Chicago Title & Trust Company, trustee in bankruptcy of Earl H. Prince, the appellee herein, by William J. Pringle and Edwin Terwilliger, Jr., its counsel, and respectfully moves that the decree of the court below be affirmed in accordance with the provision of Rule Number 6, Subdivision 5, on the ground that the questions on

which the decision of the cause depends have been so thoroughly foreclosed by previous decisions of this court as not to need further argument, and that it is manifest that said appeal is taken for delay only.

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, Jr.,
Counsel for Appellee.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1912.

No. 741.

CONTINENTAL AND COMMERCIAL TRUST
AND SAVINGS BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN
BANKRUPTCY OF EARL H. PRINCE,

Appellee.

APPEAL FROM CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

To: HORACE KENT TENNEY,
ROGER SHERMAN,
Counsel for Appellant.

PLEASE TAKE NOTICE that on Monday, the 11th day of November, 1912, at the usual motion hour, we shall appear before the Supreme Court of the United States at Washington, D. C., and move for the affirmance of the decree appealed from herein,

copy of which motion, together with copies of brief and argument of appellee in support thereof, are herewith served upon you.

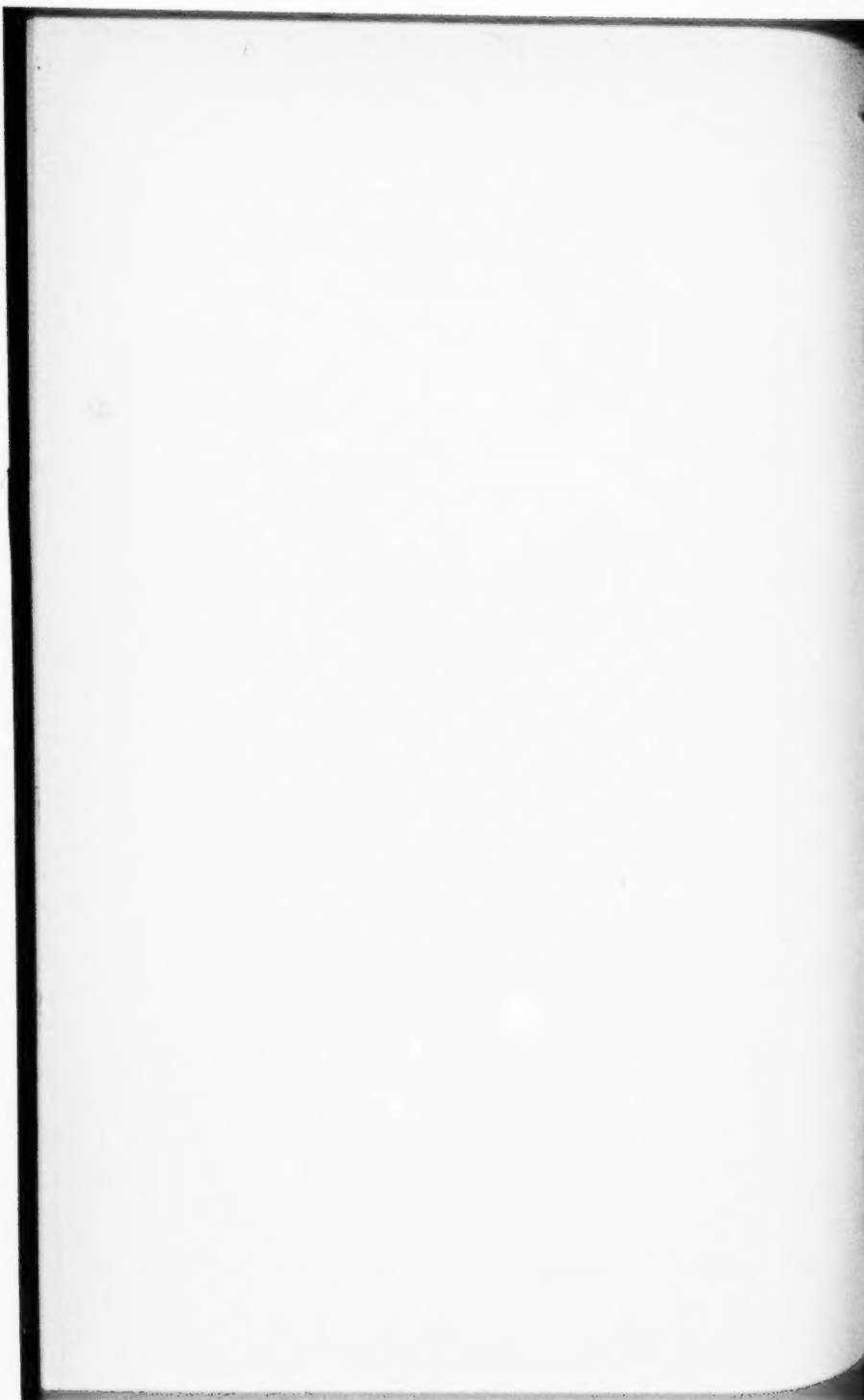
Dated, Chicago, October 21, 1912.

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, Jr.,
Counsel for Appellee.

We hereby acknowledge service of a copy of the above notice and receipt of copy of motion and of copies of brief and argument of appellee in support thereof, this 21st day of October, 1912.

HORACE KENT TENNEY,
ROGER SHERMAN,
Counsel for Appellant.





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MADE IN AMERICA

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 741

CONTINENTAL & COMMERCIAL TRUST & SAVINGS
BANK,*Appellant,*

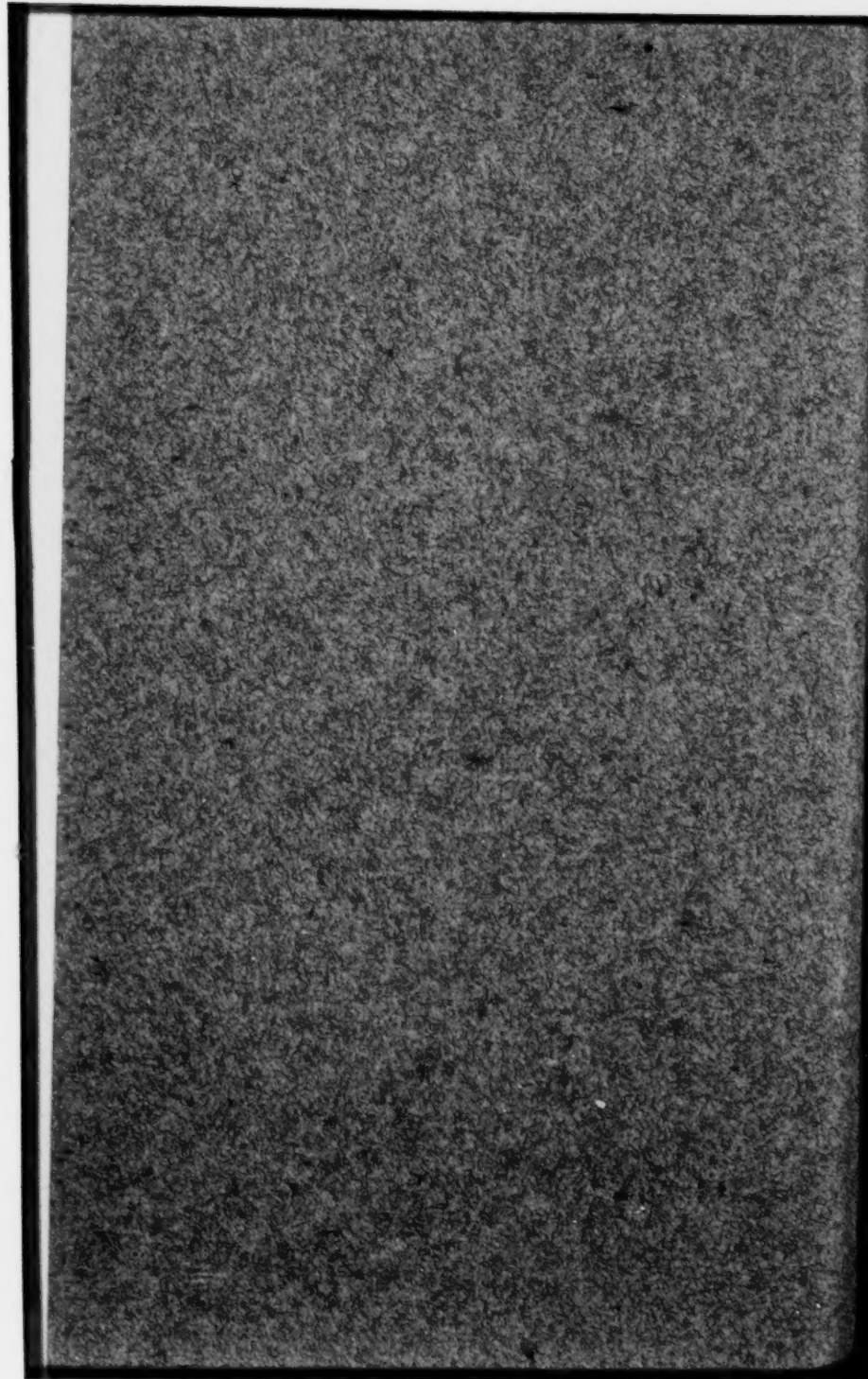
vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN BANK-
RUPTCY OF EARL H. PIERCE, BANKRUPT.*Appellee.*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.APPELLANT'S BRIEF AND ARGUMENT IN OPPO-
SITION TO MOTION TO AFFIRM.

HORACE KENT TENNEY,

ROGER SHERRIN,

Counsel for Appellant.

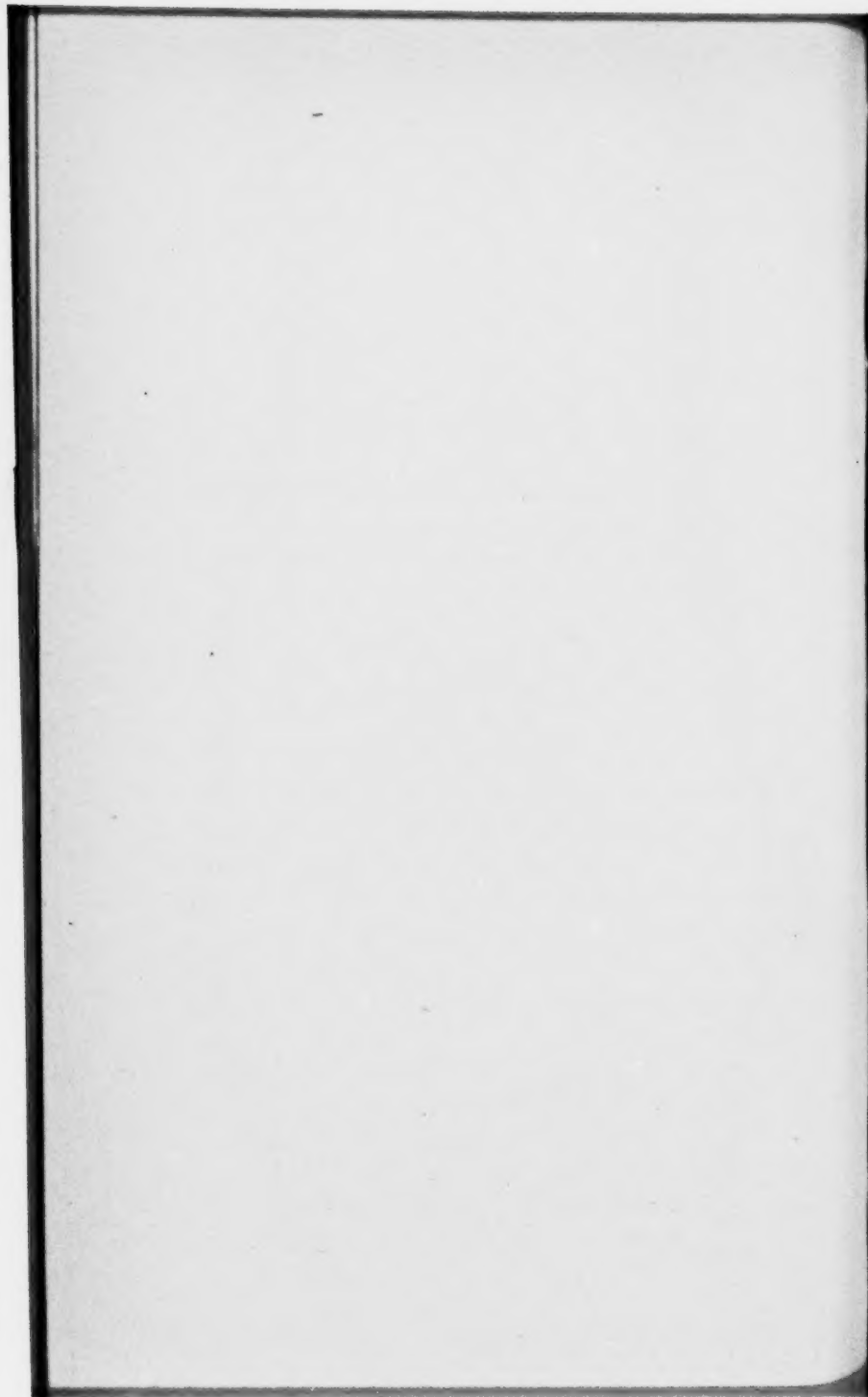


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CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN BANK-
RUPTCY OF EARL H. PRINCE, BANKRUPT,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

APPELLANT'S BRIEF AND ARGUMENT IN
OPPOSITION TO MOTION TO AFFIRM.

This brief is filed in opposition to a motion to affirm the case under section 5 of rule 6 on the ground "*that the questions on which the decision of the cause depends have been so thoroughly foreclosed by previous decisions of this court as not to need further argument, and that it is manifest that said appeal is taken for delay only.*"

Counsel for appellee have furnished an unanswerable argument against the granting of the motion. Forty-seven printed pages in their brief

are used in the attempt to show that no further argument is needed and that the questions involved have been thoroughly foreclosed by previous decisions of this court. It is patent from a reading of their elaborate argument on the merits of the case that it fits no pattern already made. If it comes within the principles heretofore laid down by the decisions of this court (favorable to counsel's contention), it is only upon the most painstaking analysis that this can be determined. If it does not come within the principles announced in other cases (unfavorable to counsel's contention) only a most exacting scrutiny of this and the other cases will reveal that fact.

Counsel have found it necessary to cite twenty-four cases, (the larger number of which are not decisions of this court), to prove that the questions involved have been foreclosed. They have stretched such decisions to the utmost limits and have shrunk the very skeleton of the case at bar to get it within the scope of former decisions. All of this means, as we submit, that on counsel's own showing this case does not come within the purpose of the motion to affirm without argument.

Counsel's invitation to argue the merits of the entire case at this time and in this way, while adroit and alluring, will be declined. We shall undertake at this time to show not that the case should be reversed on its merits but that the questions involved have not only not been foreclosed but have not been even considered in prior decisions of this court.

STATEMENT OF FACTS.

This case comes here on appeal from the United States Circuit Court of Appeals for the Seventh Circuit affirming the decree of the District Court for the Northern District of Illinois, Eastern Division. It is a suit in equity brought by the Chicago Title and Trust Company, as Trustee in Bankruptcy of Earl H. Prince against the Federal Trust and Savings Bank, and W. P. Anderson & Company to recover certain sums of money applied by the bank on Prince's notes held by it. It is claimed by the trustee that the application of these moneys constituted voidable preferences under the bankruptcy act. The master in chancery, to whom the case was referred, found for the complainant as to two of the items in dispute. These two were represented by "margin certificates" issued by the bank and the balance of Prince's checking account in the bank. The District Court overruled the exceptions of the defendant bank to the master's report, confirmed the same and entered a decree in accordance with the master's findings and the Circuit Court of Appeals affirmed this decree.

The defendant, W. P. Anderson & Company, was dismissed out of the case by the District Court. Since the institution of this suit the Federal Trust & Savings Bank, defendant, has become merged in the Continental & Commercial Trust & Savings Bank, and the name of the latter has been substituted as defendant and appellant.

On February 15, 1905, an involuntary petition in bankruptcy was filed against Earl H. Prince and subsequently the Chicago Title and Trust Company was appointed trustee. Prince was heavily indebted and his assets are not sufficient to meet his liabilities.

In the year 1905 and for many years immediately prior thereto, Prince was a broker dealing in grain and stocks as a member of the Chicago Board of Trade. The defendant, W. P. Anderson & Company, was engaged in the same business, and was also a member of the Board of Trade. The Federal Trust & Savings Bank, the defendant, was engaged in the general banking business in Chicago and did all of the banking business for Earl H. Prince. The bank also acted as a Board of Trade depository. That is to say, under the rules of the Board of Trade, moneys could be deposited by members of the Board with the bank which would issue a certificate in duplicate reciting that so much money had been deposited as security on a contract or contracts between the depositor and other parties payable on return of either certificate properly endorsed, as provided by the rules of the Board of Trade. These certificates are called "margin certificates." (Trans., p. 78.)

From September 15, 1904, to February 9, 1905, Prince secured fifteen margin certificates from the Federal Trust & Savings Bank, aggregating \$4,250. (Trans., p. 78.) These were all issued before there was any hint of Prince's insolvency. They were placed by Prince in the office of the clearing house of the Board of Trade in accordance with the rules of the board. (Trans., 87.)

On the 10th day of February, 1905, and at all times thereafter, Prince was indebted to the bank on his demand notes held by the bank for a large sum. (Trans., p. 89.) On that date the loans made to Prince, represented by these notes, were called by the bank. (Trans., p. 76.) There stood on the books of the bank in Prince's general checking account at that time a credit in Prince's favor to the extent of \$3,098.25. (Trans., p. 86.) Of this balance all but \$3.25 was applied by the bank on Prince's notes. (Trans., p. 86.)

On the 10th day of February, 1905, Prince and Charles S. Castle, vice president of the defendant bank, made an arrangement by which Prince was to make deposits and the bank was to pay therefrom salary and payroll checks for Prince's employes and checks drawn by Prince in favor of the Board of Trade clearing house. (Trans., p. 86.) The arrangement then made contemplated that Prince should thereafter deposit enough to take care of such checks as he might draw for the purpose of meeting his payrolls and keeping himself in good standing with the Board of Trade clearing house. (Trans., p. 86.)

During the period between February 10th to 14th, 1905, Prince deposited at various times four items aggregating \$3,079 and drew checks aggregating \$2,506.46, all of which the bank paid, so that there was a balance in Prince's favor on the 14th day of February, to the amount of \$575.79. This balance would have been completely wiped out had Prince drawn checks for all the salaries he owed but this for some reason he neglected to do. (Trans., 75.) (Trans., p. 86.) February 14th, the bank credited on

Prince's notes this balance of \$575.79. This amount is also in controversy in this suit. The lower court found that the application of this amount on Prince's indebtedness amounted to a voidable preference and could be recovered by the trustee in bankruptcy. (Trans., p. 97.)

On the 14th of February, 1905, Prince, Vice President Castle and W. P. Anderson (of W. P. Anderson & Co., defendant) held a meeting, at which it was agreed at the suggestion of Anderson that Anderson & Co. should take over all of Prince's trades then outstanding on the Board of Trade and should assume all liability therefor, and whatever profits or losses there might be in such trades would go to the benefit of, or be paid by, Anderson & Co., as the case might be. (Trans., p. 88.) The evidence shows that if all of Prince's trades had been closed out on the opening of the board on February 15 by Prince at the market price then prevailing there would probably have been a profit to Prince of about \$200.00. (Trans., p. 52, 89.) If on the other hand Prince had carried out his contracts the profits on them would have just about offset the losses on others and no net profit or loss would have resulted. (Trans., 90.) The master found that the plan adopted by Messrs. Prince, Anderson and Castle was the best plan that could have been adopted to avoid serious loss to Prince and his creditors. The master also found that if Anderson & Co. had not taken over Prince's trades a panic might have ensued on the Board and that the amount of the margin certificates and probably more still would have

been lost to Prince and his creditors. (Trans., p. 90.)

In pursuance of the arrangement above mentioned Anderson & Co. took over Prince's trades, put up their own margins and caused the margin certificates which were held as security on deals theretofore entered into by Prince, to be released. (Trans., p. 89.) The trades were mostly May wheat and later futures. (Trans., 57.) Anderson & Co., whose credit was much better than Prince's, had to put up as margins \$10,000 to \$15,000 within two days, so uncertain was the market. (Trans., 63.) It is clear that neither Prince nor his trustee in bankruptcy could have either settled or carried out Prince's trades.

The trades secured by margins, however, showed a large profit, the master finding that if these trades had been closed at the opening of the Board on February 15th by the members holding such certificates *there would have been due from them to Prince in the aggregate a balance of approximately one-third the amount of the certificate* (Trans., 89) or about \$1,400.

The bank credited the amount of these certificates, aggregating \$4,250, on Prince's notes held by the bank. (Trans., p. 89.) The District Court held that the application of these margin certificates on the indebtedness of Prince to the bank constituted a voidable preference and that the trustee in bankruptcy was entitled to recover the amount of such certificates. (Trans., pp. 97, 112.)

The bill of complaint was framed on the theory

that Prince, Anderson and Castle conspired together to prefer certain of Prince's creditors; that Anderson & Co. should be held as a trustee and should account to the complainant on such of Prince's deals as were profitable and stand the loss on the others; that the complainant should be subrogated to the rights of the holders of the margin certificates and that upon a showing as to which ones would have been entitled to payment of their profits out of the margin certificates held by them that such amounts whatever they were should be recovered from the bank. (Trans., p. 9, 10.) This was the theory of the bill, but no evidence was introduced to sustain it and complainant abandoned it and without amending its pleadings changed its claim into a charge that the bank had received voidable preferences, and sought a recovery on this ground alone.

There are involved in this suit two items:

- (a) The margin certificates aggregating \$4,250.00.
- (b) The bank balance of \$575.79, applied by the bank on Prince's notes.

The court below held that the trustee in bankruptcy was entitled to recover the aggregate amount of the items, together with interest thereon at five per cent., and a decree was entered accordingly. The appellant prayed an appeal to this court and filed assignments of error to the decision of the Circuit Court of Appeals. (Trans., p. 112.)

From the foregoing statement, as well as from counsel's brief, it appears that the following questions are involved:

- (1) Whether the margin certificates and the balance of the checking account constituted debts

against which the bank could set off Prince's indebtedness to the bank.

(2) Whether Sec. 68b of the Bankruptcy Act has any application to the case.

(3) Whether the application of the margin certificates and the bank balance were voidable preferences under Sec. 60a and 60b of the Bankruptcy Act.

We shall briefly consider these points in the order named under the following heads.

- (1) THE RELATION BETWEEN PRINCE AND THE BANK.
- (2) THE APPLICATION OF SEC. 68b.
- (3) WAS THERE A VOIDABLE PREFERENCE.

(1) THE RELATION BETWEEN PRINCE AND THE BANK.

The margin certificates were issued by the bank in duplicate, the bank being the Board of Trade depository. The material part of the certificates reads as follows:

"Chicago	No.
Deposited by E. H. Prince,	\$.
	Dollars

As security on a contract or contracts between the depositor and, which amount is payable on the return of this certificate, or the duplicate of the same (one of which being paid, the other shall become void), duly endorsed by both of the above named parties, or on the order of the President of the Board of Trade of the City of Chicago, endorsed on either of the original or duplicate hereof, as provided by the rules of said Board of Trade under which the above named deposit has been made.

Original

Not negotiable or transferable.

Cashier."

To procure these certificates Prince either drew his check against his checking account in the bank or deposited the required sum of money. Each of the certificates evidenced a liability of the bank to Prince for the amount stated therein payable to him unless required to be paid to the other parties named therein because of a default by Prince in the contract for which the certificates were held by the other party as security.

It is apparent that if the relations thus established were merely those of banker and depositor—*i. e.*, debtor and creditor—then the amount represented by the certificates could be lawfully applied by the bank on Prince's indebtedness to it. If, on the other hand, as to these amounts the bank was a bailee or trustee, such right of application and set-off might not exist. Accordingly we find the appellee urging that the bank's position was that of bailor or trustee, while the bank insists that the relation was that of debtor and creditor. As to the checking balance, of course Prince was a mere depositor.

From this statement it is apparent that the determination of this question depends more on the facts in the case than on any prior decision, since it must be admitted that no other case involves the same or even similar facts.

Since it is here claimed by appellee that "the questions on which the decision of the case depends have been so thoroughly foreclosed by previous decisions of this court as not to need further argument," we might reasonably expect a citation of at least one decision of this court, that is decisive of

this important question. Forty-seven pages of brief and argument reveal none.

The case most nearly in point on this question is that of *Bank v. Massey*, 192 U. S., 138 (cited by counsel), in which it was held that when deposits are made in a bank after insolvency of the depositor and after knowledge thereof on the part of the bank, the amount so deposited may be applied on notes of the depositor held by the bank. In the case at bar the situation was the same as to the balance of checking accounts. As to the margin certificates the situation was the same except that here the deposits were evidenced by certificates instead of by a mere checking account.

In the Massey case we have authority for the bank's applying a general checking account on notes of the bankrupt held by the bank. But it is claimed by appellee that Prince's account was not "general" but "special." This is denied by the bank and in order to determine whether it was "general" or "special" and consequently whether or not the Massey case is conclusive *against appellee*, we must carefully consider the arrangement that was entered into between the bank and Prince, under which the deposits in question were made. While we are anxious to enter into this discussion at the appropriate time, it does not seem germane to the motion now before the court.

The opinion in the Massey case comes nearer touching our case in the matter of the bank balance than in the matter of the margin certificates. It is, on its facts, concerned merely with a balance in bank. If it be conceded that the margin certificates

are in the same category as checking accounts then the Massey case utterly refutes appellee's claim. If it be claimed (as counsel do claim) that bank balances and margin certificates stand on a different footing so far as the right of set-off is concerned then clearly the Massey case does not control our case. In other words, either the Massey case controls or does not control. If it does control our case it is decisive against appellee. If it does not control it has no pertinancy in connection with the motion now before the court. Of course it is our contention that it does control in our favor and this is one of the questions we will ask the court to consider when the case is argued on its merits.

The case of *Libby v. Hopkins*, 104 U. S., 307, is also cited by counsel for appellee though it is not seriously contended that it is conclusive of the questions here involved. In that case, Hopkins, being indebted to his bankers, A. T. Stewart & Co., on a promissory note secured by a real estate mortgage, forwarded certain drafts, with directions to credit them as payment on his note. Stewart & Co., in violation of the express direction of Hopkins to credit them as payment on his note, gave him credit on an open account with the bank. The case therefore involves the question of the misapplication of funds. No question of deposit arose as Hopkins did not consent to become a depositor. Whatever the bank did was contrary to instructions.

In our case no such elements are present. In fact the chief ground of recovery here is that the bank and the bankrupt acted in harmony. Nor is there

any dispute but what the money in question was on deposit in the bank. The character of the deposit only is in dispute.

The distinction as to the case of *Libbey v. Hopkins* also applies to the case of *Western Tie Co. v. Brown*, 196 U. S., 506, which is cited by counsel. In this case the relation of the parties was principal and agent. The Tie Company under authority of Harrison, the bankrupt, was accustomed to collect from Harrison's debtors money owed to Harrison, and to transmit such money immediately to Harrison. After Harrison's insolvency it continued to collect money, but without Harrison's consent retained such money and applied it on an indebtedness which Harrison owed. Under the facts, therefore, as found by the court, the Tie Company wrongfully retained the money which belonged to Harrison,—not money which it owed Harrison as debtor, but money which belonged to Harrison,—without the consent or acquiescence of Harrison.

The court finds and bases its decision upon the fact that the course of dealing between the bankrupt and the creditor,—that is, the Tie Company,—was such that the Tie Company "was under an obligation to remit the money collected from the laborers for account of Harrison to him (Harrison), irrespective of any debt which he might owe the Tie Company." There was between them a contract by which the Tie Company was to collect the moneys and remit them to Harrison, no matter how much Harrison might owe the Tie Company from time to time. In other words, the Tie Company had no right to mingle the funds so collected with its own, or do anything with them, but remit them direct to Harrison.

In our case we have no such situation. The bank did not promise or agree that the amounts represented by the margin certificates should be paid to Prince irrespective of his indebtedness to the bank, and in the absence of such agreement, of course the one indebtedness could be set off against the other. This feature of our case alone, distinguishes it in principle and in fact from the decision in the Western Tie Company case.

Furthermore, in that case the court also found, and lays stress upon the fact, that all the collections by the Tie Company from the laborers were made with intent to secure a preference. In our case, as we have already seen, the indebtedness represented by the margin certificates was created before there was any hint of insolvency, and necessarily without any such intent.

The other three cases cited by counsel on this point, *Scott v. Armstrong*, *Yardley v. Philler* and *National Bank v. Butler*, are scarcely worthy of comment in this connection. The first arose under the National Banking Act which had no provision for set-off. Nevertheless the court held that a customer who had borrowed money of the bank, giving his note due in the future, and had deposited the proceeds in the bank, was entitled on the insolvency of the bank to set-off the deposit against the amount due on his note.

In the second case, *Yardley v. Philler*, a clearing house association (not a bank) claimed a right of set-off against an insolvent bank, but the debt due the bank was created by the acts of the clearing house association *after* the latter learned the bank

was actually in the hands of a receiver. The court held the situation must be viewed as of the time of insolvency and no set-off could be allowed.

The third case, *National Bank v. Butler*, is similar in principal to the Yardley case above mentioned. Even counsel do not claim that it is at all conclusive of the case at bar. It is thrown in as a mere make weight. The decisions of various state courts are relied upon principally as sustaining appellee's contention on the merits of this phase of the case.

(2) THE APPLICATION OF SEC. 68b.

This section provides that a set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt if it was purchased or transferred to him within four months of the filing of the petition in bankruptcy.

It is claimed on the one hand that since the bank acquired the margin certificates within the four months period, it had no right to use them as a set-off. On the other hand it is urged by the bank: First, that the certificates were mere evidences of a debt. The debt was created months before Prince's insolvency. Acquiring the certificates did not change the situation in the least. The bank had the right of set-off in any event. The situation now is the same as if the trustee held the certificates and was suing on them; Second, that Section 68b has no application since by its terms it applies only to set-offs *in favor of persons who are already indebted to the estate*. It is claimed that the purpose of the act is plainly to prevent persons who owe the insolvent from buying up claims against

the insolvent (presumably at a discount) and using such claims as a means of avoiding payment to the bankrupt's estate. Applied to our case it means that the bank, being indebted to Prince, could not buy up claims against him and use the latter as set-offs against its indebtedness to Prince's estate. Of course there is no such situation in the case at bar.

The contention now made by Prince's trustee is that Prince's obligation to the bank (evidenced by his notes to it made long prior to the four months' period) cannot be used as a set-off against the bank's indebtedness to Prince (evidenced by the margin certificates) *because the bank acquired the evidences of that indebtedness within the four months' period.* Such an application turns the statute upside down and inside out. Sec. 68b presupposes *a debtor to the bankrupt*, but here we have a *creditor of the bankrupt*.

Of course it cannot be said that the question has been "thoroughly foreclosed" by previous decisions of this court in favor of such an application of the statute. It is true that in the case of *Western Tie Co. v. Brown*, 196 U. S., 502, the court discusses Sec. 68b as applying to a case where a creditor of the bankrupt acquires property of the bankrupt. The case was, however, decided on other grounds and a perusal of it will show that it is no such decision on this point as forecloses further discussion. On the contrary it plainly invites further discussion.

There are two possible situations:

1st. Where a *debtor* of the bankrupt secures a claim against the bankrupt and tries to apply it on

his indebtedness to the bankrupt. This is the situation that is covered by Section 68b.

2nd. Where a *creditor* of the bankrupt becomes indebted to the bankrupt, and against such indebtedness sets off his own claim against the bankrupt. Here it is plain Section 68b does not apply, because by its terms it applies only to set-offs "*in favor of any debtor*" and "claims provable against the estate," *i. e.*, claims in favor of and not against the creditor.

In the Tie Company case this distinction was evidently not pointed out to the court nor considered by it. It is quite significant that this is the only case to be found even hinting that Section 68b has any such application. Inasmuch as the statute plainly indicates no such application was intended and the court based its decision on other grounds we submit that the decision in that case should not be held to preclude further argument.

(3) WAS THERE A VOIDABLE PREFERENCE.

The portion of the Bankruptcy Act bearing upon this phase of the question reads as follows:

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of * * * such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

b. If a bankrupt shall have given a preference and the person receiving it * * * shall have had reasonable cause to believe that it was in-

tended thereby to give a preference, it shall be voidable by the trustee. * * *

It is claimed by the trustee that Prince gave the bank a preference both as to the margin certificates and as to the bank balance of \$575.79. It is claimed by the bank that there was no preference as to either because,

(a) There was no "transfer" of any property. The certificates were issued long before insolvency. There was a mere indebtedness of the bank to Prince on the certificates as to which the bank claims the right of set-off.

(b) When this indebtedness was incurred and the certificates were issued Prince's estate was not diminished.

(c) When the \$575.79 was deposited there was no transfer of property; there was no intention to prefer. There was no cause for the bank to believe that a preference was intended.

The determination of these questions necessarily involves an examination of the evidence in the case. The exact terms of the agreement under which Prince made the deposits in question must be determined. The number and character of his deposits, and of the checks drawn against such deposits and many other circumstances must be taken into account before the question of a preference can be determined. We submit that the evidence conclusively shows that there was no preference and no evidence of any preference and will so demonstrate at the appropriate time. It seems to us, however, that where

the determination of a case depends upon a mixed question of law and fact and where the facts are such that in all probability no court ever had a similar situation before it, it cannot with reason be claimed that the question involved has been conclusively foreclosed by other decisions of this court. Unless it be shown that this court has passed upon the question of a preference under the circumstances of this case it cannot be that we are precluded from arguing the question.

The question of a preferential transfer is in its very nature, we submit, such a question that the decision in one case will rarely if ever preclude argument in another case differing on the facts. For this reason, we submit, this phase of the case should be argued on its merits and not be determined by attempted analogy to some other case.

The concluding paragraph in the argument of appellee indicates that they think we should be spanked into having the merits of this case determined on this motion because we would not agree to submit the case without opportunity to fully present the case to the court. They do not explain why they delayed the taking of evidence for four years without apparent reason, though their haste is now very great and their concern for creditors touching. It would appear that their present desire for a quick decision has caused them to make this motion and not any abiding faith that the motion is really meritorious.

Respectfully submitted,

HORACE KENT TENNEY,

ROGER SHERMAN,

Counsel for Appellant.

We hereby acknowledge service of a copy of the foregoing brief and argument of appellant in opposition to the motion to affirm this 7th day of November, 1912.

Counsel for Appellee.

16
Office Supreme Court, U. S.
FILED.

DEC 16 1912

JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the United States.
OCTOBER TERM, A. D. 1912.

No. 741

CONTINENTAL & COMMERCIAL TRUST & SAVINGS
BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN BANK-
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Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

HORACE KENT TENNEY,
ROGER SHERMAN,

Counsel for Appellant.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 741

CONTINENTAL & COMMERCIAL TRUST & SAV-
INGS BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, TRUSTEE
IN BANKRUPTCY OF EARL H. PRINCE, BANKRUPT,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF CASE.

This case comes here on appeal from the United States Circuit Court of Appeals for the Seventh Circuit affirming the decree of the District Court for the Northern District of Illinois, Eastern Division. It is a suit in equity brought by the Chicago Title and Trust Company, as Trustee in Bankruptcy of Earl H. Prince against the Federal Trust and Sav-

ings Bank, and W. P. Anderson & Company to recover certain sums of money applied by the bank on Prince's notes held by it. It is claimed by the trustee that the application of these moneys constituted voidable preferences under the bankruptcy act. The master in chancery, to whom the case was referred, found for the complainant as to two of the items in dispute. These two were represented by "margin certificates" issued by the bank and the balance of Prince's checking account in the bank. The District Court overruled the exceptions of the defendant bank to the master's report, confirmed the same and entered a decree in accordance with the master's findings and the Circuit Court of Appeals affirmed this decree.

The defendant, W. P. Anderson & Company, was dismissed out of the case by the District Court. Since the institution of this suit the Federal Trust & Savings Bank, defendant, has become merged in the Continental & Commercial Trust & Savings Bank, and the name of the latter has been substituted as defendant and appellant.

On February 15, 1905, an involuntary petition in bankruptcy was filed against Earl H. Prince and subsequently the Chicago Title and Trust Company was appointed trustee. Prince was heavily indebted and his assets are not sufficient to meet his liabilities.

In the year 1905 and for many years immediately prior thereto, Prince was a broker dealing in grain and stocks as a member of the Chicago Board of Trade. The defendant, W. P. Anderson & Company, was engaged in the same business, and was also a member of the Board of Trade. The Federal

Trust & Savings Bank was engaged in the general banking business in Chicago and did all of the banking business of Earl H. Prince. The bank also acted as a Board of Trade depository. That is to say, under the rules of the Board of Trade, moneys could be deposited by members of the Board with the bank which would issue a certificate in duplicate reciting that so much money had been deposited as security on a contract or contracts between the depositor and other parties payable on return of either certificate properly endorsed, as provided by the rules of the Board of Trade. These certificates are called "margin certificates." (Trans., 78.)

From September 15, 1904, to February 9, 1905, Prince secured fifteen margin certificates from the Federal Trust & Savings Bank, aggregating \$4,250. (Trans., p. 78.) These were all issued before there was any hint of Prince's insolvency. They were placed by Prince in the office of the clearing house of the Board of Trade in accordance with the rules of the board. (Trans., 87.)

On the 10th day of February, 1905, and at all times thereafter, Prince was indebted to the bank on his demand notes held by the bank for a large sum. (Trans., p. 89.) On that date the loans made to Prince, represented by these notes, were called by the bank. (Trans., p. 76.) There stood on the books of the bank in Prince's general checking account at that time a credit in Prince's favor to the extent of \$3,098.25. (Trans., p. 86.) Of this balance all but \$3.25 was applied by the bank on Prince's notes. (Trans., p. 86.)

On the 10th day of February, 1905, Prince and Charles S. Castle, vice-president of the defendant bank, made an arrangement by which Prince was to make deposits and the bank was to pay therefrom salary and payroll checks for Prince's employes and checks drawn by Prince in favor of the Board of Trade clearing house. (Trans., p. 86.) The arrangement then made contemplated that Prince should thereafter deposit enough to take care of such checks as he might draw for the purpose of meeting his payrolls and keeping himself in good standing with the Board of Trade clearing house. (Trans., p. 86.)

During the period between February 10th and 14th, 1905, Prince deposited at various times four items aggregating \$3,079 and drew checks aggregating \$2,506.46, all of which the bank paid, so that there was a balance in Prince's favor on the 14th day of February, to the amount of \$575.79. This balance would have been completely wiped out had Prince drawn checks for all the salaries he owed but this for some reason he neglected to do. (Trans., 77.) (Trans., p. 86.) February 14th, the bank credited on Prince's notes this balance of \$575.79. This amount is in controversy in this suit. The lower court found that the application of this amount on Prince's indebtedness amounted to a voidable preference and that it could be recovered by his trustee. (Trans., p. 97.)

On the 14th of February, 1905, Prince, Vice-President Castle and W. P. Anderson (of W. P. Anderson & Co., defendant) held a meeting, at which it was agreed at the suggestion of Anderson that Anderson & Co. should take over all of Prince's trades

then outstanding on the Board of Trade and should assume all liability therefore, and whatever profits or losses there might be in such trades would go to the benefit of, or be paid by, Anderson & Co., as the case might be. (Trans., p. 88.) The evidence shows that if all of Prince's trades had been closed out by Prince on the opening of the board on February 15 at the market price then prevailing there would probably have been a profit to Prince of about \$200,00. If on the other hand Prince had carried out his contracts the profits on some would have just about offset the losses on others and no net profit or loss would have resulted. (Trans., 90.) The master found that the plan adopted by Messrs. Prince, Anderson and Castle was the best plan that could have been adopted to avoid serious loss to Prince and his creditors. The master also found that if Anderson & Co. had not taken over Prince's trades a panic might have ensued on the Board and that the amount of the margin certificates and probably more still would have been lost to Prince and his creditors. (Trans., p. 90.)

In pursuance of the arrangement above mentioned Anderson & Co. took over Prince's trades, put up their own margins and caused the margin certificates which were held as security on deals theretofore entered into by Prince, to be released. (Trans., p. 9.) The trades were mostly May wheat and later futures. (Trans., 57.) Anderson & Co., whose credit was much better than Prince's, had to put up margins \$10,000 to \$15,000 within two days, so uncertain was the market. (Trans., 63.) It is clear

that neither Prince nor his trustee in bankruptcy could have either settled or carried out Prince's trades.

The bank credited the amount of these certificates, aggregating \$4,250, on Prince's notes held by the bank. (Trans., p. 89.) The District Court held that the application of these margin certificates on the indebtedness of Prince to the bank constituted a voidable preference and that the trustee in bankruptcy was entitled to recover the amount of such certificates. (Trans., pp. 97, 112.)

The bill of complaint was framed on the theory that Prince, Anderson and Castle conspired together to prefer certain of Prince's creditors; that Anderson & Co. should be held as a trustee and should account to the complainant on such of Prince's deals as were profitable and stand the loss on the others; that the complainant should be subrogated to the rights of the holders of the margin certificates and that upon a showing as to which ones would have been entitled to payment of their profits out of the margin certificates held by them such accounts whatever they were should be recovered from the bank. (Trans., p. 9, 10.) This was the theory of the bill, but no evidence was introduced to sustain it and complainant abandoned it and without amending its pleadings changed its claim into a charge that the bank had received voidable preferences, and sought a recovery on this ground alone.

There are involved in this suit two items:

- (a) The margin certificates aggregating \$4,250.00.
- (b) The bank balance of \$575.79, applied by the bank on Prince's notes.

The court below held that the trustee in bankruptcy was entitled to recover the aggregate amount of these items together with interest thereon at five per cent., and a decree was entered accordingly. This decree was affirmed by the Circuit Court of Appeals. The appellant prayed an appeal to this court and filed assignments of error to the decision of the Circuit Court of Appeals. (Trans., p. 140.)

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court and the Court of Appeals erred in holding that the defendant bank had no right to set off the indebtedness due it from Prince against the \$4,250 evidenced by the margin certificates.
2. The said courts erred in holding that the application by the defendant bank of the \$4,250 represented by the margin certificates on the indebtedness due the defendant bank from Prince constituted a voidable preference under the Bankruptcy Act, and can be recovered by the complainant in this action.
3. The said courts erred in holding that the defendant bank had no right to set off the indebtedness due it from Prince against the \$575.79 remaining in Prince's checking account on February 14, 1905.
4. The said courts erred in holding that the application by the defendant bank of the balance of Prince's checking account of \$575.79 on the indebtedness due the bank from Prince constitutes a voidable preference and can be recovered by the complainant in this action.

5. The Court of Appeals erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the Master in Chancery filed in said cause, which exception reads as follows:

"In that the Master has found that the application of the proceeds of \$4,250 of margin certificates constituted a preferential payment, whereas he should have found that the indebtedness represented by these certificates was incurred by the bank before it knew of Prince's insolvency and is a debt against which Prince's indebtedness to the bank can be set off."

6. The Court of Appeals erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the master in chancery filed in said cause, which exception reads as follows:

"For that the said master has found that the deposit of \$575.79 constitutes a preferential payment, whereas he should have found that it does not constitute a payment at all, but a claim against which the bank's claim against Prince can be set off."

7. The court erred in affirming the decree of the District Court which overruled the exception filed by the defendant bank to the report of the master in chancery filed in said cause, which exception reads as follows:

"For that the said master found (pp. 21-22) that there was a transfer of the item of \$575.79 made to the Federal Trust & Savings Bank with intent to use this amount as a set-off against Prince's indebtedness to the bank. Whereas the master should have found first, that there was no intention on Prince's part to prefer the bank, to the extent of \$575.79, nor any other

amount, nor reasonable ground for belief on the part of the bank that a preference was intended, and second, that said amount was deposited with the bank with the intention that the bank should use the same, not as a set-off, but for the purpose of paying an unknown amount of checks."

8. The Circuit Court of Appeals erred in affirming the decree of the District Court.

BRIEF OF ARGUMENT.

I.

THE SUMS REPRESENTED BY THE MARGIN CERTIFICATES
CONSTITUTED A DEBT AGAINST WHICH THE BANK COULD
LAWFULLY SET OFF PRINCE'S INDEBTEDNESS TO THE
BANK.

(1) *The debts were such as could be set off, one
against the other.*

U. S. Statutes (Bankruptcy Act), Sec. 68a.

Where deposits have been made in a bank after
the bank has knowledge of the depositor's insol-
vency, the bank can apply the deposits on the depos-
itor's notes held by the bank.

Bank v. Massey, 192 U. S., 138.

In re George M. Hill Co., 130 Fed., 315.

Lowell v. International Trust Co., 158 Fed.,
781.

In the absence of a special agreement, when mon-
eys are deposited in a bank the bank gets the title
to the funds deposited and becomes a mere debtor
to the depositor. The presumption is that where de-
posits are made the relation of debtor and creditor
is established.

Minard v. Watts, 186 Fed., 245.

Mutual Accident Association v. Jacobs, 141
Ill., 261.

Where moneys are held in trust by a bank and are

mingled with the other funds so that they cannot be traced, the depositor has no standing except as a general creditor.

Union National Bank v. Goetz, 138 Ill., 127.

Where the trust is fulfilled or fails, the moneys is due absolutely to the depositor.

American Exchange Bank v. Mining Co., 165 Ill., 103.

Deposits in a bank are held by the bank as bailee (where the title remains in the depositor) or as debtor (where the title to the deposits has passed to the bank).

Scammon v. Kimball, 92 U. S., 362.

Brahm v. Adkins, 77 Ill., 263.

Deposits are presumed to be general unless the contrary is specified or distinctly implied.

Morse on Banks and Banking (4th Ed.), Sec. 192.

The bankrupt's liability as endorser on a note not due at the time of bankruptcy can be set off by a bank against money on deposit in the bank, these debts being *mutual* within the meaning of the bankruptcy act.

In re Philip Semmer Glass Co., 135 Fed., 77.

Germania Savings Bank & Trust Co. v. Loeb, 188 Fed., 285.

The term "mutual debts and mutual credits," in Section 68a of the present Bankruptcy Act requires only that the debts set off against each other be claims existing at the time of the bankruptcy which

are provable in their nature even though they are not yet due.

The term "mutual debts and mutual credits" in Section 68a of the Bankruptcy Act of 1898 appear in substantially the same form in Section 20 of the Bankruptcy Act of 1867 and in Section 5 of the Act of 1845. These terms have long had a definite legal meaning and the right of set-off under the act in which they are used is as broad as the right of set-off at common law.

Set-offs of "mutual debts" were allowed in equity from the earliest times and the meaning of the term in the Bankruptcy Act is the meaning it had at law when the act was passed.

Scott v. Armstrong, 146 U. S., 499.

THE WORDING OF THE CERTIFICATES.

Certificate printed in full. (Trans., 78; *post* 15.)

The sums represented by the certificates were "*payable*" to Prince.

Trans., 78.

The moneys were "*deposited*." This implies an ordinary debt.

Trans., 78.

The certificate evidences money deposited, and the certificate evidencing the bank's receipt of the money was to be used as security on a contract in which the bank was not interested.

Trans., 78.

The bank became a mere debtor to Prince.

(2) *The master's reasons for refusing to allow the set-off were erroneous.*

First. There was no transfer of property within the terms of the Bankruptcy Act.

U. S. Statutes (Bankruptcy Act), Section 60a and Section 60b.

The deposit of funds in a bank after knowledge on the part of the bank of the depositor's insolvency, does not constitute a preference.

Bank v. Massey, supra.

In re George M. Hill Co., supra.

Lowell v. International Trust Co., supra.

Second. Section 68b of the Bankruptcy Act does not apply to this case.

This section applies only to set-offs or counter-claims of persons who are already indebted to the estate.

Where a debtor of the bankrupt secures a claim against the bankrupt and tries to apply it on his indebtedness to the bankrupt, Section 68b controls.

Where a creditor of the bankrupt becomes indebted to the bankrupt and against such indebtedness sets off his own claim against the bankrupt, Section 68b does not apply.

II.

THE APPLICATION OF THE BANK BALANCE OF \$575.79 WAS
NOT A PREFERENCE.

Deposits made with a bank after knowledge of insolvency are not preferences, although thereby the bank obtains an advantage over other creditors.

Bank v. Massey, supra.

The evidence does not justify the conclusion that either the bankrupt or the bank intended that a preference should be given to the bank.

ARGUMENT.

I.

THE SUMS REPRESENTED BY THE MARGIN CERTIFICATES CONSTITUTED A DEBT AGAINST WHICH THE BANK COULD LAWFULLY SET OFF PRINCE'S INDEBTEDNESS TO THE BANK.

THE FACTS.

Between September 15, 1904, and February 9, 1905, the bank issued to Prince fifteen margin certificates varying in amount from \$250 to \$300, aggregating \$4,250. The last certificate was issued February 9 and there is no evidence in the record that Prince was then insolvent or that anyone so considered him. These certificates contained the names of ten different firms with whom Prince had trades pending (Trans., 78). All of these certificates (except as to names, dates, numbers and amounts) were in the following form (Trans., 78):

"Chicago No.

Deposited by E. H. Prince, \$.....

Dollars

as security on a contract or contracts between the depositor and, which amount is payable on the return of this certificate, or the duplicate of the same (one of which being paid, the other shall become void), duly endorsed by both of the above named parties, or on the order of the President of the Board of Trade of the City of Chicago, endorsed on either of the original or duplicate hereof, as provided by the rules of said Board of Trade under which the above named deposit has been made.

Original

Not negotiable or transferable.

.....
Cashier."

To procure such certificates Prince drew his check against his checking account in the bank, or deposited with it the requisite sum of money. Each of the certificates evidenced a liability of the bank to Prince for the amount stated in the certificate, payable to him unless required to be paid to the other parties named therein because of a default by Prince on the contract for which the certificate was held by the other party as security. (Trans., 78.)

These certificates were issued in accordance with a rule of the Board of Trade which provides that purchasers shall have the right to require of sellers, as security, a deposit of 10%, based upon the contract price of the property bought, and further security from time to time as the market advances, and that sellers shall also have the right to require, as security from buyers, a deposit of 10% on the contract price of the property sold, and in addition, any differences that may occur between the estimated value of the property and the purchase price. The rules also provide that banks may be authorized to issue margin certificates to be used in such cases and become authorized depositories for securities on giving bonds for the proper disposal of deposits handled by them, and when such banks are so authorized they are known as "Board of Trade Depositories."

On the 14th day of February, Charles S. Castle, who was then vice-president of the Federal Trust & Savings Bank, and Earl H. Prince had a conference at the bank in reference to the financial affairs of Prince, and while together Mr. Castle telephoned to W. P. Anderson, who was then president and

treasurer of W. P. Anderson & Company, asking him to come to the bank, which he soon thereafter did. Castle then informed Anderson that Prince was in financial trouble; that he had quite a number of open trades, and asked Anderson's advice as to the best way to close them. Anderson suggested that Prince transfer them to some other dealer and close them up in that way. Prince asked Anderson if his company would take them and he agreed that it would. (Trans., 51.)

Prince then transferred his outstanding trades on the Board to W. P. Anderson & Company and Anderson & Company, in accordance with the custom of the Board, assumed all of said trades and was duly substituted in the place of Prince with the other parties thereto, and made its own arrangements with the other contracting parties with reference to securities and margins. Thereupon Prince was relieved from the obligation of said contracts, and the certificates were delivered to the Federal Trust & Savings Bank. Prince was then indebted to the bank in a sum far exceeding the amount of said certificates, but not exceeding \$37,000.00. The bank then credited the amount of said certificates upon the indebtedness which Prince then owed to it. (Trans., 93.) The method of closing out Prince's deals was the most advantageous to his creditors and probably prevented a panic on the Board of Trade. (Trans., 90-91.)

THE QUESTION PRESENTED.

The question thus presented is whether the sums represented by these margin certificates constituted a debt on the part of the bank against which the bank could set-off its claim against Prince. The question before us—stated most favorably for appellee—is the same as would be presented if the margin certificates had fallen into the hands of the trustee in bankruptcy. Could the trustee recover from the bank the full amount represented by them; or could the bank set off against that claim the indebtedness evidenced by Prince's notes held by the bank?

(1) *The debts were such as could be set-off, one against the other.*

The section of the Bankruptcy Act relating to set-offs reads as follows:

“Sec. 68a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.”

Since we find Prince indebted to the bank to the extent of about \$37,000 and we find the bank indebted to Prince *and to him alone* to the extent of \$4,250 on the margin certificates, it would appear, *prima facie*, that one debt could be set off against the other. It has been squarely held by the highest authority that where deposits have been made in a bank after the bank has knowledge of the depositor's insolvency, the bank can set-off the depositor's note against the claim arising out of the deposit. Or to

state it more briefly, the bank can apply the deposits on the depositor's notes held by the bank.

Bank v. Massey, 192 U. S., 138.

In re George M. Hill Co., 130 Fed., 315.

Lowell v. Inter. Trust Co., 158 Fed., 781.

All the certificates were secured by Prince prior to the time the bank knew of his insolvency and Prince at the time of securing the certificate clearly did not intend to prefer the bank. The funds used to secure the certificates did not diminish the assets of Prince since in each case he got the obligation of the bank for the money used for this purpose. (*Bank v. Massey, supra.*)

To be sure, the indebtedness, when created, was subject to possible rights of other parties to the trades dependent upon the outcome of the trades. Whether it would become an absolute indebtedness to Prince depended on whether those trades, if carried through to maturity, resulted in a loss to Prince, and thus in a claim in favor of other parties, or whether the other parties to the deals released their claims. It is clear that when the other parties released their claims against Prince on the trades, their rights against the margin certificates were at an end, and the certificates simply represented so much money due from the bank to Prince. This they did on February 14. It was as if the bank had given notes to Prince from time to time between September 14, 1904, and February 9, 1905, all maturing February 14th. If this had been the case, probably no one would claim there was any preference or that the bank could not set off one indebtedness against the other.

Under the section relating to set-offs, debts and credits arising out of different transactions may be set off against each other especially when they arise in the ordinary course of business between the parties as in this case. The bank was doing a general banking business and as to all money deposited must be presumed to be a debtor of the depositor unless the contrary was agreed upon. The presumption is that all money held in a bank on deposit in checking accounts, savings accounts, on margin certificates or on certificates of deposit is money belonging to the bank which it has the right to use as it pleases and for which it is merely a debtor to the depositor. While we have found no case squarely holding a bank is no more than a debtor as to margin certificates such as are here involved, there seems to be no good reason for holding otherwise. The fund might well be deposited for a special purpose as between the holders of the margin certificates, but that does not change the bank's relation to the fund. The situation is the same as where a bank issues a certificate of deposit payable on return when indorsed by specific persons or when there is a savings account in the names of two persons. In many cases money is deposited in a bank subject to withdrawal only on checks countersigned by one or more persons. In all such cases no one would contend for a moment the bank would be anything but a debtor as to such funds. So in the case at bar if the bank issued a certificate payable on return of the certificate or its duplicate duly endorsed by both parties named therein, or on the order of the president of the Board of Trade, it was bound to pay the

money when demanded by a party presenting the certificate properly endorsed, and had no concern as to which of the parties presented it, or as to the result of the trades it was to secure. Hence, it was a mere debt.

The Circuit Court of Appeals, in speaking of the "deposits" that were made to secure these margin certificates says (Trans., 136):

"Each of the outstanding certificates so issued to the bankrupt was on deposit with the 'Clearing House of the Board,' as required by the rules, evidencing the amount thus pledged with the bank as security for the trade therein mentioned, which had not been closed. Under this state of facts, we believe the deposits thus made and accepted at the bank were plainly so limited in their purpose, that the rule in reference to general deposits by a customer of the bank is without force therein; that each was received and certified by the bank, as depository of the fund thus pledged by the bankrupt for performance of his trade, creating no title thereto in the bank, nor other right than that of bailee or stakeholder, to hold for payment in conformity with the stated purpose. So, the fact of deposit and holding thereunder vested no right in the bank to divert the fund from such purpose and apply it upon the bankrupt's indebtedness."

We respectfully submit that this statement shows a failure to comprehend the real nature of the transaction. It is true that the *certificates themselves* were pledged as security to the parties to the contract. But the funds used in purchasing the certificates were not held as a pledge. It was exactly as if Prince had secured certified checks from the bank instead of margin certificates. It is recited

that the certificates are "payable" when properly indorsed. There is no suggestion anywhere that the bank is a trustee and required to perform the duties of a trustee. If certified checks instead of certificates had been used the rights of the parties would have been the same and probably no one would contend that in such event the debts could not be set off one against the other.

The Court of Appeals also apparently misunderstood the transaction resulting in the issuing of the certificates. Prince either gave his check or deposited the required amount. (Trans., 78.) In either event he merely *purchased* the obligation of the bank in suitable form for his use. The court's statement clearly indicates that the court understood that Prince made a special deposit when he purchased the certificates. Such is not the case. Prince might as well have purchased the bank's note or a cashier's check. In such event, of course there could be no claim that the money used to purchase the bank's obligation was held by the bank as bailee. The bank would have the right (as in the case at bar) to mingle the purchase price of the obligation with its own funds and this is the true test of whether or not the depository is a bailee or a mere debtor.

When Prince secured a certificate of deposit he bought and paid for it. The certificate was the mere obligation of the bank to pay. When the other parties to the Board transaction released their claim to the certificate it became an absolute indebtedness of the bank to Prince. It is therefore apparent that there is no question of deposit—general or special—

involved in this part of the case. It is merely a question of setting off the debt of the bank to Prince evidenced by the certificates against the indebtedness of Prince to the bank evidenced by his notes. The right to set-off under such circumstances is secured by both statute and common law. The fact that the certificates are not in the form of a promissory note or check should not affect the right of set-off. They were, after all, nothing but obligations to pay. No one contends that there was a fund set apart in the bank represented by these certificates. No one contends that the moneys used by Prince to purchase the certificates could not with perfect propriety be mingled with the other moneys of the bank. We submit, therefore, that this question is not to be determined by inquiring into the nature of general and special deposits. The question is not one of deposits, but one of obligations—an indebtedness of Prince to the bank and an indebtedness of the bank to Prince.

The court also speaks of "*diverting the fund*" and applying it upon the bankrupt's indebtedness. The fund was not diverted but used in exact accordance with the written contract. The certificates were payable to Prince just as soon as the rights of other parties to the Board of Trade transaction ceased. When this happened Prince was credited with the amount the certificates represented.

The holding of the Circuit Court of Appeals that the bank held the funds as a bailee or trustee is, we submit, erroneous for another reason. The determination of the question of whether a person is a bailee or trustee on the one hand or a mere debtor

on the other is determined by answering the question whether or not the holder has the right to mingle the funds with his own. If he does have that right, he becomes a mere debtor as to the fund. That we contend is the situation here.

In the case of *Minard v. Watts*, 186 Fed., 245, the complainants were involved in litigation between themselves over the title to some land and agreed that the tenant on the land, one Fowler, should deposit the rentals in the bank pending final decision, the rentals to go to the successful party. Under this agreement \$450 was deposited. The bank became insolvent and complainants claimed the money so deposited was a trust fund which they were entitled to recover in full. The court, however, held the bank was a mere debtor of complainants and in the course of its opinion said (p. 246):

“While out of the great variety of transactions that may be had between a banking institution and those dealing with it there may arise many different relations, depending for their legal effect on the precise facts which characterize the particular transaction, yet in this case the facts leave no room for doubt, and the parties have stipulated the transaction between complainants and the bank was one of deposit, in the following language:

‘It is agreed by the parties hereto that there was not, at any time, any expressed agreement, or understanding between Henry Minard, or the Garrett Biblical Institute, or either of them, on the one part, and the First National Bank of Fort Scott, Kan., on the other part, that the deposits or any of them, referred to in the bill of complaint in this case, were to be held or kept separate and distinct from the general funds of the bank.’

Therefore the transaction here involved, being one of deposit, the legal status of the parties thus created must be either that of bailor and bailee, or of creditor and debtor; for no other legal relation can arise out of the act of one depositing money with a bank.

The question therefore is: Was the deposit in this case general or special? If general, complainants parted with their title to the funds deposited, the relation of debtor and creditor was by the act of deposit created between complainants and the bank, and the obligation undertaken by the bank was to pay over the amount of the deposit to the successful complainant in the litigation between them which occasioned its making, and, the bank having failed meanwhile, complainants are now entitled only to prorate with the general creditors of the bank. If, however, the deposit was special, complainants did not by the act of deposit part with the title to the particular funds deposited, the bank had no right to mingle the moneys deposited with its own property, or to use the same, and must return the identical funds deposited; for it then occupies the position and assumed the obligation of a bailee and not a debtor. * * *

As it is stipulated by the parties, there was no express agreement or understanding between the parties in this case that the deposit made should be considered as special, and, as there was nothing in the character of the transaction had in this case from which there may be found an implied agreement or understanding between the parties to that effect, it must be held the deposits made were general and not special.

Much reliance is placed by complainants on the case of *Libby v. Hopkins*, 104 U. S., 303, 26 L. Ed., 769. However, an examination of that case will disclose it is not in point. The facts in that case were these: Hopkins, being indebted to his bankers, A. T. Stewart & Co., on a promissory note secured by a real estate

mortgage, forwarded certain drafts, with directions to credit as payment on his note, on receipt of which Stewart & Co., in violation of the express direction of Hopkins to credit as payment on his note, gave him credit on open account with the bank. In that case no question of deposit arose for decision, for the reason Hopkins did not consent to become a depositor with the bank. On the contrary that was a case of misapplication of the remittance received by Stewart & Co. from Hopkins, by giving credit instead of making payment. Stewart & Co. on account of such misapplication of the funds of Hopkins, was held at the suit of his trustee in bankruptcy a trustee *ex maleficio*."

The reasoning of the court in *Minard v. Watts* applies with great force to the case at bar. The Federal Trust & Savings Bank was doing a banking business, and it cannot be presumed the bank was acting as bailee in respect to the funds in controversy. The presumption is quite the contrary. It would require a special contract showing the bank agreed to act as bailee before it would become such bailee. There is no question in this case but that the bank had a perfect right to mingle the funds represented by the margin certificates with its own funds, and undoubtedly Prince and the members of the Board of Trade knew that the bank did so. This being so, the bank became a mere debtor of Prince as soon as the deposit was made.

In *Mutual Accident Association v. Jacobs*, 141 Ill., 261, \$6,000 was deposited by the Mutual Accident Association in a bank and the bank issued a certificate in the following form:

"CHICAGO, Oct. 4, 1890.

This is to certify that the Mutual Accident Association of the Northwest has deposited

with Samuel A. Kean, of the County of Cook, State of Illinois, the sum of \$6000, to be held by the said Kean upon the following conditions: Whereas, one Emma A. Tuggle, of the County of McDonough, recovered a judgment against the said Accident Company for the sum of \$5000 and costs, from which the said Accident Company have taken an appeal to the Appellate Court; and whereas, the said Samuel A. Kean and Jesse H. Cummings have signed the appeal bond in the said case; now, therefore, this \$6000 deposited with Samuel A. Kean is to be held by the said Kean to indemnify himself and the said Jesse H. Cummings from any loss or liability incurred by them, or either of them, by reason of having signed said appeal bond, and after the said Jesse H. Cummings and Samuel A. Kean are fully discharged from all liability under said bond, then the said \$6000 is to be returned to the said Mutual Accident Association, but not otherwise.

S. A. KEAN & Co. (Branch),
 WESELEY L. KNOX,
Manager."

It will be seen that the language used is far more indicative of a trust than is the language used in the margin certificates in question.

Petitioner claimed the money constituted a trust fund which Kean's assignee in insolvency should pay to petitioner as soon as the sureties were discharged from all liability. The Supreme Court held that the deposit was a general deposit and that the relation of debtor and creditor arose between Kean and petitioner so that the latter could only *pro rate* with other creditors. The court said (p. 267):

"As we understand the question, there is a wide difference between a special and a general deposit, as those terms are understood, not

only by bankers, but by the public, who are transacting business daily with the banks. Where money of any description is deposited in a bank, and the identical gold or silver or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special, while on the other hand, a general deposit is a deposit 'which is to be returned to the depositor in kind.' * * *

Where gold or silver coin, or a package of bills or currency, is received in a bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business,—its duty is to safely keep and return the identical money; but where there is a general deposit, the understanding being that a like sum of lawful money should be returned, the bank is permitted to use the money in its general business, and the relation of debtor and creditor is created by the transaction. There is nothing in the certificate of deposit which was issued by Kean & Co. which indicates that a package amounting to \$6000 had been deposited, there to remain for a time and be returned. That was not the transaction, but, as is clearly shown from the evidence, the petitioner gave Kean & Co. a check on another bank, which went through the clearing house and was paid, and Kean & Co., with the knowledge of the petitioner, mingled the money with the general funds in the bank. This \$6000 was commingled with the general funds of the bank in the same manner as money deposited by other depositors. The money thus became the funds of the bank, and, as such, upon the failure of Kean & Co. could not be followed by the petitioner. If the \$6000 had been placed in a separate package, and thus deposited in the bank, and had never been mingled with the general funds of the bank, the position of the petitioner might be sustained; but such was not the case."

In the case of *Union National Bank v. Goetz*, 138 Ill., 127, it was held that, even though moneys are held in trust, still, if they be mingled with other funds so that they cannot be traced, the depositor has no standing except as a general creditor.

Assuming that there was originally a trust, the trust had ceased. In the case of the deposit of a trust fund, when the trust is fulfilled or fails the money is due absolutely to the depositor. (*American Exchange Bank v. Mining Co.*, 165 Ill., 103.)

Since the certificates were issued to protect other parties to the trades, and such parties had surrendered their claims to the certificates, there was nothing left for the bank to do but to pay Prince the money. It is idle to claim that the bank was not indebted to Prince and to him alone on those certificates. If this be so, no reason appears why the indebtedness represented by the notes cannot be set off against the indebtedness represented by the margin certificates.

The distinction made by the court in *Minard et al. v. Watts*, *supra*, as to the case of *Libby v. Hopkins* also applies to the case of *Western Tie Co. v. Brown*, 196 U. S., 506, which was cited by the Circuit Court of Appeals. In this case the real relation of the parties was principal and agent. The Tie Company under authority of Harrison, the bankrupt, was accustomed to collect from Harrison's debtors money owed to Harrison, and transmit such money immediately to Harrison. After Harrison's insolvency it continued to collect money, but without Harrison's consent retained such money and applied it on

an indebtedness which Harrison owed it. Under the facts, therefore, as found by the court, the Tie Company wrongfully retained the money which belonged to Harrison,—not money which it owed Harrison as debtor, but money which belonged to Harrison,—without the consent or acquiescence of Harrison.

The court finds and bases its decision upon the fact that the course of dealing between the bankrupt and the creditor,—that is, the Tie Company,—was such that the Tie Company “was under an obligation to remit the money collected from the laborers for account of Harrison to him (Harrison), irrespective of any debt which he might owe the Tie Company.” There was between them a contract by which the Tie Company was to collect the moneys and remit them to Harrison, no matter how much Harrison might owe the Tie Company from time to time. In other words, the Tie Company had no right to mingle the funds so collected with its own, or do anything with them, but remit them direct to Harrison.

In our case we have no such situation. The bank did not promise or agree that the amounts represented by the margin certificates should be paid to Prince irrespective of his indebtedness to the bank, and in the absence of such agreement, of course the one indebtedness could be set off against the other. This feature of our case alone, distinguishes it in principle and in fact from the decision in the Western Tie Company case.

Furthermore, in that case the court also found, and lays stress upon the fact, that all the collections by the Tie Company from the laborers were made with intent to secure a preference. In our case,

as we have already seen, the indebtedness represented by the margin certificates was created before there was any hint of insolvency, and necessarily without any such intent.

In *Scammon v. Kimball*, 92 U. S., 362, cited by the Court of Appeals, where the contention was that a fund in a bank was a trust fund and could not be set off against money due the bank on fire insurance policies issued by the insolvent company, the court said (p. 370):

"All deposits made with bankers may be divided into two classes, namely: those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money, peculiar to banking business, in which the depositor for his own convenience, parts with the title of his money, and loans it to the banker; and the latter in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *Marine Bank v. Fulton Bank*, 2 Wall., 256."

Morse on Banks and Banking (4th Ed., Sec. 192) says:

"Ordinarily a deposit of money, at least if it be the current money of the country or state where the deposit is made, will be assumed to be a general deposit, unless the contrary is at the time directly notified, or in some shape distinctly implied, so that the bank could not reasonably misunderstand the depositor's intent."

In *Brahm et al. v. Adkins*, 77 Ill., 263, the court said (p. 264):

"The paper introduced in evidence showed merely the fact that defendants were bankers, a deposit with them by plaintiff, and the amount

thereof. It was *prima facie* a general deposit. A deposit is general unless the depositor makes it special, or deposits it expressly in some particular capacity."

In the case at bar, the bank at the time it received the deposits in question had no knowledge of Prince's insolvency, nor indeed is it shown that he was insolvent. It is true that, long after the indebtedness was incurred, Prince acting upon the advice of Anderson & Co. transferred his trades to Anderson & Co. and the trades were settled up. The court and master find that had this course not been pursued there would have resulted a condition which would have not only swept the entire fund evidenced by the margin certificates out of existence but would have greatly increased the amount of Prince's losses. Had the bank not taken any part in settling Prince's trades, the estate of Prince would not, in any event, have gotten any of this money, because, all would probably have gone to holders of the margin certificates, and if not all, any balance left in the bank could have been applied by the bank on Prince's debts to it. The act of the bank therefore in all probability saved immense losses on Prince's trades but in no event diminished the fund available for Prince's other creditors.

The master (Trans., 98) undertook to distinguish *Bank v. Massey*, 192 U. S., 138, from the case at bar on the ground that there was a general checking account and said (Trans., 98):

"It is well settled that unless there are mutual credits and debits arising out of a general course of business the allowance of a set-off or counterclaim which results in giving a preference to

one creditor over others, is within the inhibition of the Bankruptcy Act."

Apparently he and the Circuit Court of Appeals held that the debts were not mutual because the debt to Prince was not in a deposit account but they do not attempt to define "mutual debts" and "mutual credits" within the terms of the act. In the cases cited above, where set-offs against general checking accounts were allowed, this was only because the bank is held to be a debtor of the depositor as to money in such accounts, and not because there is any more virtue in a checking account than in any other debt. If the money represented by the margin certificates was a debt of the bank to Prince, then these debts were as much *mutual* with the sums owed by Prince on promissory notes as was the money in a checking account. No good reason can be given why all debts and all credits between the parties which arise before the bankruptcy are not mutual. Frequently a note given by a bankrupt to a bank is set off against a deposit account and it does not make any difference whether or not the note was due at the time of the bankruptcy. The court in *In re Philip Semmer Glass Co.*, 135 Fed., 77, went much further and held that the bankrupt's liability as indorser on a note not due at the time of the bankruptcy could be set off by a bank against money in the bank on deposit. The court said that the trustee's argument that there could be no set-off was interesting and ingenious, but entirely disregarded Section 1, Subd. 11, Bankr. Act, July 1, 1898, C. 541, 30 Stat., 544 (U. S. Comp. St. 1901, p.

3419), which provides that the word "debt," when used in said act,

"shall include any debt, demand or claim provable in bankruptcy. That meaning must be given to the word when used in the set-off section. * * * To determine therefore whether the holder of a claim is entitled to the benefit of Section 68, it is necessary only to inquire whether his claim is one provable in bankruptcy."

This case was followed and fully approved in *Germania Savings Bank & Trust Co. v. Loeb*, 188 Fed., 285. We therefore find the courts holding that any provable claim, even though the liability is entirely contingent, may be set off against a debt due the bankrupt. "Mutual debts," therefore, does not necessarily mean debts absolutely due. Apparently all provable debts arising in the usual course of business are mutual.

In considering what is meant by mutual debts and mutual credits in Section 68a of the Bankruptcy Act, we should consider what the legal meaning of these terms was when the Act was passed. That they did have a settled meaning is shown by the fact they appeared in substantially the same form in Section 20 of the Bankruptcy Act of 1867 and in Section 5 of the Act of 1841. As we shall show by the cases hereafter cited, set-offs were allowed in equity from early time.

In *Scott v. Armstrong*, 146 U. S., 499, the court said:

"In equity relief was usually accorded, says Mr. Justice Story (Eq. Jr., § 1435), 'where, although there are mutual and independent debts, yet there is a mutual credit between the parties,

founded, at the time, upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand, a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to, such debt, as a means of discharging it.'

This definition is hardly broad enough to cover all the cases where, as the learned commentator concedes, there being a 'connection between the demands, equity acts upon it, and allows a set-off under particular circumstances' (§1434). Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it, and the ordinary rule is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due upon the other. *Blount v. Windley*, 95 U. S., 173, 177."

And on page 511 the court says, after stating that set-offs were allowed under the Bankruptcy Act of 13 Eliz., C. 7, though the Act was silent on the subject:

"The succeeding statutes were but in recognition, in bankruptcy and otherwise, of the practice in chancery in the settlement of estates, and it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts for creditors, the set-off of debts due has been universally conceded. The equity of equality among creditors is either found inapplicable to such set-offs or yields to their superior equity."

From the above authorities it appears that "mutual debts" only means debts mutually owing and that the right of set-off under Section 68a is as broad as the right of set-off at common law.

The master, in holding that there was no right of set-off under Section 68a of the Bankruptcy Act as there were not mutual debts and mutual credits within said section, cites as authority *In re Lynden Mercantile Co.*, 156 Fed., 713, and *Irish v. Citizen's Trust Co.*, 163 Fed., 880. (Trans., 98.) The first is a case involving only the validity of a chattel mortgage made by a bankrupt. A party made a loan to a bankrupt company and took a chattel mortgage on the company's stock of merchandise. The money was deposited in a bank, which was the largest creditor of the bankrupt, whereupon the bank applied almost the entire \$4,000 on debts of the bankrupt. The lender was closely related to the bank and a member of the banking firm acted as his agent in making the loan. The court found this transaction was not *bona fide* but was intended to enable the bank to secure a preference. The chattel mortgage was therefore held void as to creditors. By the acts complained of the assets of the bankrupt available to other creditors were reduced by \$4,000. In the case at bar the margin certificates had been issued before insolvency and the master found that in the event Prince's trades had been carried out no part of the money represented by the certificates could have gone to the other creditors of the bankrupt.

In *Irish v. Citizens Trust Co.*, 163 Fed., 880, we find nothing bearing on what constitute mutual debts and mutual credits within Section 68a of the Bankruptcy Act, but we do find the court holding that where there are debts which may be set-off, the giving by the bankrupt of a check with intent to prefer when the creditor knew of the insolvency, does

not destroy the creditor's right of set-off. Hence, in the case at bar, if the right to set-off existed on February 9th, the subsequent events did not destroy it.

THE WORDING OF THE CERTIFICATES.

An exact copy of the form of the certificates has been set out above (p. 15).

It is noticeable at the outset that an amount of money is "*payable*." This of itself indicates merely an indebtedness as where a note is "payable" 30 days after date.

It will also be observed that there is no language from which any *trust* can be inferred. There is nothing to indicate the bank intended to take upon itself the duties of a trustee. This would mean that if it made use of the money it would be bound to account for any profits. On the other hand, this writing is very similar to a certificate of deposit or a non-negotiable note. It is payable on demand when presented by either party properly endorsed. The bank has no concern with any contract or trade it is given to secure. It is bound only to pay when demand is made according to agreement. The fact a margin account was kept in a separate book by the Bank is of no significance whatever. Every bank keeps its checking accounts, its savings accounts and its certificate of deposit accounts separately, *but does not keep the moneys separate*. It is still more absurd to contend the bank did not get legal title to the money, but was a mere bailee. A bank does not engage in that kind of business except in special cases and by spe-

cial agreement. Its right to use money on deposit is its reward for services rendered. The admitted facts show that what it received when it issued certificates, was either cash or a check drawn against Prince's own deposit account. It could not have held these as special deposits—which would require *each one* to be kept separately—without departing from the well known usages of banks. The presumption is that the Bank became a debtor of Prince. The Bank therefore at all times had a right of set-off against this indebtedness and the trustee in bankruptcy took Prince's estate subject to this right.

THE MASTER'S REASONS FOR REFUSING TO ALLOW THE
SET-OFF WERE ERRONEOUS.

We shall now consider the reasons apparently or expressly assigned by the master and lower courts for refusing to allow the bank to set off one claim against the other. They seem to have based their refusal upon two grounds.

First: That there was a transfer of property within the terms of the Act defining preferences; and

Second: That Section 68b prohibiting debtors from buying up claims after knowledge of insolvency applies to this case.

We will discuss these points in the ^{order} ~~other~~ mentioned:

First. There was no transfer of property within the terms of the Bankruptcy Act.

The portion of the Bankruptcy Act bearing upon this phase of the question reads as follows:

"Sec. 60a. A person shall be deemed to have

given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of * * * such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. * * *

b. If a bankrupt shall have given a preference and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee. * * *

In order to establish a preference it must appear primarily that the bankrupt made a *transfer* of property under the conditions stated in the statute. Section 1 (25) of the Act says "transfer shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." It is not apparent what the alleged transfer consisted in but we will take up in order such acts as could possibly be held to be transfers.

(a) *Securing the margin certificates.*

When the certificates were secured checks were drawn by Prince or moneys deposited in the bank to cover them. To the extent of such *money* so deposited Prince made transfers to the bank, *long before his insolvency*. To the extent that he gave the bank checks drawn on his own deposit account, he transferred nothing to the bank, but merely gave it a voucher for charging against what it owed him on his deposit account the amounts which were now represented by a new form of the bank's indebted-

ness on the certificates. And it is to be remembered that his deposit account was largely made up of the discount of the notes which the bank held; so that in checking against it he was drawing on the proceeds of the notes. But aside from this, when he made the deposits he received in return the certificates ~~with~~^{for} the same amount as the funds he parted with, so his estate was not diminished. Furthermore the certificates were all obtained before insolvency or knowledge of insolvency and without the thought of preference on one side or the other. Hence it seems clear that securing the certificates did not constitute a prohibited transfer.

(b) *Taking up the certificates and turning them over to the bank.*

The case of *Bank v. Massey, supra*, is authority for the proposition that the test of a transaction as to whether or not it is a preference—is whether or not the bankrupt's estate is diminished by the transaction. The same case is authority for the rule that a transaction may result in preference to one creditor over the others, but this does not render it voidable. In the Massey case the bank was benefitted by deposits made after knowledge of insolvency but the transaction was permitted to stand, because when the moneys were deposited the bankrupt's estate was not diminished.

Now in our case at the time the question arose the certificates in question were held as security for certain trades. If the trades proved to be profitable to Prince he would get the certificates back,—if unprofitable they would be partially or entirely con-

sumed in making up the loss. If the trades were profitable something would be coming to him from them in addition to the return of the certificates. But these (possible) profits did not go to the bank and are not now in question. When Anderson & Co. released Prince's certificates they did all that Prince's estate could hope for—*i. e.*, got the certificates free of all claims. Suppose that instead of delivering them to the bank Anderson had given them to Prince, where would the case stand? Prince would have the certificates evidencing a debt of the bank to him. The bank would have Prince's notes evidencing a debt of him to the bank. Could one be set off against the other? We are back to the original question above discussed. From this it seems clear that the delivery of the certificates to the bank amounted to nothing as it did not change the rights of the parties in the least. The taking up of the certificates, then, and delivering them to the bank was not a transfer.

There is another consideration in this connection also. The master found (Trans., 90-91):

“That had Anderson & Company not taken charge of Prince's trades and carried them through a panic might have ensued on the Board and the market so fluctuated that the amount of all the margin certificates and quite likely a considerable more, would have been lost to Prince and his creditors.”

This being so, it would appear that the activities of Anderson, including the taking up of the certificates and delivering them to the bank, not only did not diminish but probably increased the bankrupt estate, and decreased the indebtedness. According

to the test of loss or profit to the estate, the transaction was not a preference. But suppose that after Anderson had brought about the release of Prince's securities, Prince had gone to the bank and got the cash on the certificates and had then deposited the money in the bank, and the bank had applied the deposit on Prince's notes, under the clear authority of *Bank v. Massey*, *supra*, *In re George M. Hill Co.*, *supra*, and *Lowell v. International Trust Co.*, *supra*, there would be no preference. We are now told, however, that a transaction involving identically the same results amounts to a preference. Of course the statute is concerned only with the results. If the results of two transactions are the same and if one of the transactions does not constitute a preference the other does not.

(c) *The crediting of the amount on Prince's notes.*

The master finds (Trans., 97) that the application of the \$4,250 by the bank on Prince's notes was a preferential transfer. In *Lowell v. Trust Company*, *supra*, it was held that the application of moneys on deposit on the depositor's note held by the bank was not a preference. It was further held that the application made no difference one way or the other. The rights of the parties are the same whether the account stands open or the deposits are credited on the notes. From this it would appear that whatever may be said of the entire transaction, the application by the bank of the \$4,250 cannot be questioned.

Second. Section 68b does not apply to this case.

Section 68b reads as follows:

“A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or was transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that the said bankrupt was insolvent or had committed an act of bankruptcy.”

The plain wording of the section indicates that it applies only to set-offs or counter-claims *in favor of persons who are already indebted to the estate*, though the Circuit Court of Appeals holds that it applies where *creditors* of the bankrupt become *debtors*. The statute requires that such counter-claims shall be provable claims and shall not have been purchased with a view to using them for the debtor's benefit and to the detriment of the bankrupt estate. To state it a little more concretely it means that a man who is indebted to the bankrupt, shall not buy up a claim against the bankrupt and use it as a set-off. If it has any application in this case as against the bank it must mean that the bank could not buy up a claim against Prince and use it as a set-off to the bank's obligation to Prince on the margin certificates. Such an application, we submit, is nothing short of absurd. The thing complained of throughout is the transfer to the bank of *its obligations to Prince*—not the securing by the bank of a claim against Prince.

Section 68b presupposes a *debtor to the bankrupt*. It is directed against him alone. It prevents him



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from buying claims against the bankrupt. It must be, then, that what the bank is prohibited from doing was buying up claims against Prince. Unfortunately for the bank, it already had an over-supply. The bank is here charged with acquiring *claims against itself*. The statute is intended to prevent acquiring *claims against the bankrupt*.

In the case of *Western Tie Co. v. Brown*, 196 U. S., 502, cited by the Court of Appeals, it is true the court discusses Section 68b of the Bankruptcy Act as applying to a case where, within the four months' period, the creditor of the bankrupt acquires property of or an indebtedness to the bankrupt. There is, however, no direct holding that such section does apply to such a case, and it is quite clear from the language of the Act itself it was not intended to and does not in fact cover such a case.

There are two possible situations:

1st. Where a debtor of the bankrupt secures a claim against the bankrupt and tries to apply it on his indebtedness to the bankrupt. This is the situation that is covered by Section 68b.

2nd. Where a creditor of the bankrupt becomes indebted to the bankrupt, and against such indebtedness sets off his own claim against the bankrupt. Here it is plain Section 68b does not apply, because that by its terms applies only to set-offs "*in favor of any debtor*" and "*claims provable against the estate,*" *i. e.*, claims in favor of and not against the creditor.

In the Tie Company case this distinction was evidently not pointed out to the court nor considered

by it. It is quite significant that this is the only case to be found even hinting that Section 68b has any such application. Inasmuch as the statute plainly indicates no such application was intended and the court did not decide the case on that point, it would seem unnecessary and ill-advised to follow the dictum of the court as conclusive of the case at bar.

All that the court decided in that case was:

- (a) There was no voidable preference.
- (b) The Tie Company could prove its entire claim against the bankrupt.
- (c) The Tie Company was a debtor to the estate to the extent of the deductions from the payrolls collected by it.
- (d) Since the Tie Company collected the amounts as trustee for the bankrupt, one indebtedness could not be set off against the other.

There is no finding or holding that, where a pre-existing, contingent debt of the *creditor* of the bankrupt to the bankrupt ripens into an absolute indebtedness within the four-months' period, such creditor cannot against such indebtedness set off his own claim against the bankrupt.

In our case the margin certificates represented a liability or debt of the bank to Prince, subject to the happening of a contingency by which other parties might secure a right to a portion of this liability. The liability was one at all times due from the bank to Prince and was subject only to the claims of other parties on the happening of a certain contingency. The notes which the bank seeks

to set off were acquired by the bank long before insolvency was considered possible.

We submit that it is a perversion of the statute to try to apply it to such a situation as we have presented in the case at bar. Section 60 of the Bankruptcy Act is intended to and does cover preferential payments. Section 68b covers the attempts of *debtors to the bankrupt* to avoid paying what they owe, by buying up counter-claims. Each has its function.

II.

THE APPLICATION OF THE BANK BALANCE OF \$575.79 WAS NOT A PREFERENCE.

As to the sum of \$575.79 found by the trial court to be a preference, the facts are as follows:

About the 10th of February, 1905, immediately preceding the knowledge of Prince's insolvency, it was agreed between Prince and the bank that if Prince would deposit moneys enough to pay certain salary checks of employes of Prince, payroll checks and checks to the manager of the Board of Trade clearing-house, such checks would be honored by the bank. In pursuance of this agreement, and from February 10th to February 14th, Prince deposited in the bank four checks of different amounts aggregating \$3,079. (Trans., 86.) The checks of the kinds stated above that were honored by the bank during that period aggregating \$2,506.46.

The difference between these deposits and withdrawals was \$572.54. This with the \$3.25 (the amount remaining to Prince's credit February 10th)

left, on February 15, 1905, a balance in Prince's favor to the extent of \$575.79, which the bank on that day applied on the indebtedness owing by Prince to the bank. In all there were twenty-five checks honored by the bank during the period stated, most of them being for small sums.

The only fair conclusion that can be arrived at in connection with these facts, is that in some way, through Prince's oversight or carelessness in adding, or through disregard on his part as to whether his deposits exceeded the checks drawn against the fund, the deposits exceeded the checks honored by the bank to the extent mentioned. For anything that appears in the evidence, it may be that checks were drawn by Prince more than sufficient to use up this \$575.79, but for some reason were not presented to the bank. That Prince did owe to employees far more than the amount he deposited is shown by the fact that at the time of the transfer of his trades on the evening of February 14th Prince still owed about \$1,000 for salaries to his employees. (Trans., 75.) In any event, there certainly is nothing to show that there was any intention on the part of Prince to deposit a larger sum than would cover the checks that he was drawing against the fund.

In order to establish a voidable preference under Section 60a of the Bankruptcy Act, it must appear that the bankrupt made a transfer of property; that the bankrupt intended to prefer the creditor, and that the creditor preferred must have had reasonable cause to believe a preference was intended.

Where a deposit is made in a bank after insol-

veny and with knowledge of insolvency on the part of the bank, and the amount so deposited is applied by the bank on the indebtedness of the depositor to the bank, there is no preference. (*Bank v. Massey* and other cases cited above.)

The decisions expressly hold that in the case of deposits solvency or insolvency makes no difference—the bank can appropriate all the deposits at the time of bankruptcy. There is no difference in principle between the sums deposited before February 10 and those deposited after that date. After February 10 Prince continued to deposit and draw checks—the bank continued as Prince's banker. The only change in the situation was that the bank did not honor all the checks presented, but this did not change the relations of Prince to the bank, nor change the law with respect to the bank's rights. There is not the slightest intimation that Prince was to deposit all his funds in the bank or that he and Castle contemplated that there would be anything in the account beyond enough to take care of the payroll and clearing house checks. The fact that the amount deposited by Prince slightly exceeded his withdrawals would not justify the conclusion that he intended to prefer the bank, especially in view of the fact that he still owed \$1,000 for salaries for which he neglected to draw checks.

Neither ^{was} the master and trial court justified in finding that the bank had cause to believe that a preference was intended. The only evidence on the subject showed that Prince deposited various amounts on various days

and drew against these deposits a large number of checks for varying amounts, and at the conclusion of this transaction it happened that there was a small balance in his favor. There is no showing of how this happened or what the intent or purpose of it was. The bank was ready to pay all salary checks so long as the money lasted and certainly was not expecting to secure any of the balance on deposit. In any event being deposits, though made after knowledge of insolvency, they could be retained by the bank. (*Bank v. Massey, supra.*)

The Circuit Court of Appeals finds that the balance of the checking account, on hand February 14, was a special deposit and that the bank held it not as debtor but as bailee. It further held that the title to the moneys did not pass to the bank. We have then, on the one hand the Massey case, holding that the balance of a checking account can be applied on the depositor's debt to the bank although the deposits are made after knowledge of insolvency and on the other the case at bar where all of the conditions are identical with those in the Massey case except that in our case the depositor agreed in advance to draw against the account, only in favor of certain classes of persons, but here the balance cannot be applied on the depositor's debt to the bank. In the Massey case it is held that the title to the funds does pass and that the bank is a mere debtor. The Circuit Court of Appeals does not point out why it is that an agreement as to future payees of the checks determines whether the title does or does not pass to the bank. The real basis for the deci-

sion in the Massey case, as clearly expressed, is that when the deposits are made the bankrupt's estate is not diminished. When Prince made the deposits in question his estate was not diminished as he could draw the deposit all out the moment after it was made. The relation of banker and depositor, *i. e.*, debtor and creditor, continued to the end and if the balance on hand February 10 could lawfully be applied by the bank on Prince's notes, as the trial court held, it is difficult to see why the balance on hand February 14 could not be so applied.

The Circuit Court of Appeals (Trans., 135), in holding that the bank balance of \$575.79 was a "special deposit" relies on the authority of *Libby v. Hopkins*, 104 U. S., 303, and *Western Tie Co. v. Brown*, 196 U. S., 502. In *Libby v. Hopkins* no question of deposit was involved. The creditor, a merchant, received a remittance from the debtor, also a merchant, with instructions to apply it on the latter's mortgage held by the former. In violation of such instructions the creditor applied it on an open account between them. The court says (p. 309):

"But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt."

The court held that since the money was sent for one purpose it could not be used for another. The case is therefor no authority on general and special deposits. In *Western Tie Co. v. Brown*, neither party was a banker and there were no deposits. These citations are, therefore, poor authority for holding that the bank balance was a special deposit.

Viewing the case as a whole it will be seen that

the bank is merely claiming the right to retain moneys which originally belonged to it. Prince borrowed \$37,000 from the bank on his notes. These very funds were used by him to secure the margin certificates and presumably his bank balance was indirectly traceable to the same source. The bank furnished the funds that are now in dispute. The complainant is seeking to take away funds from the bank that the bank provided. It is not as if the bank were taking out of Prince's estate funds that were derived from other sources. It is also to be remembered that the bank has not profited by its transactions with Prince but is the loser to the extent of more than \$30,000, even if its present contentions are sustained. It is merely a question of how much the bank shall lose. There seems to be no good reason why the claims of other creditors who furnished none of the funds should be preferred to those of the bank which supplied the money and is certain to lose at least \$30,000.

For the reasons stated above, we submit that the decrees of the District Court and the Circuit Court of Appeals should be reversed and the case remanded with directions to enter a decree dismissing the bill for want of equity.

Respectfully submitted,

HORACE KENT TENNEY,

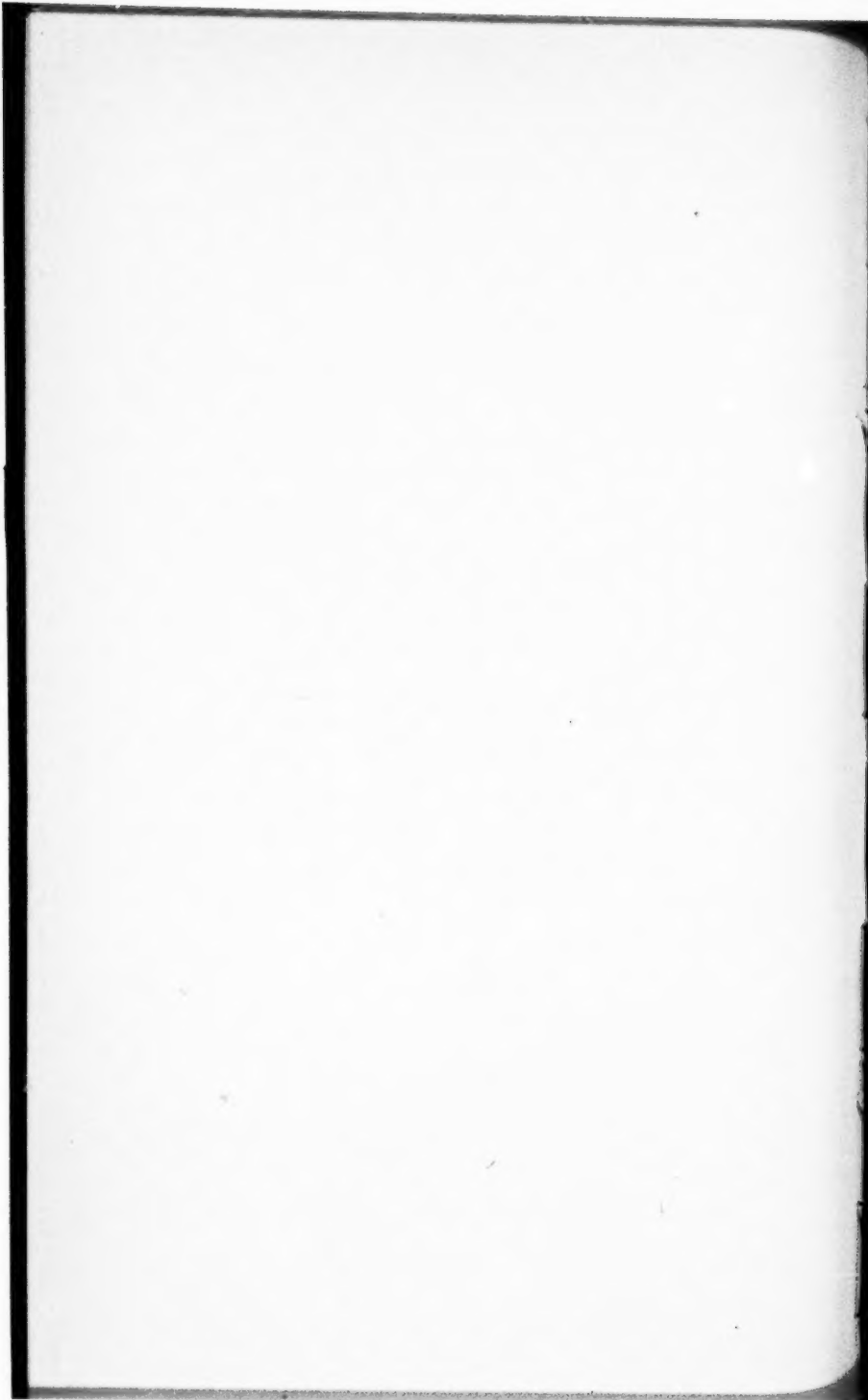
ROGER SHERMAN,

Counsel for Appellant.

We hereby acknowledge service of copies of the foregoing brief and argument of Appellant thisday of December, 1912.

.....
.....
Counsel for Appellee.





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Office Supreme Court, U. S.
FILED.

DEC 30 1912

JAMES H. McKENNEY,
CLERK.

No. 741.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1912.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

CONTINENTAL & COMMERCIAL TRUST &
SAVINGS BANK,

Appellant,

vs.

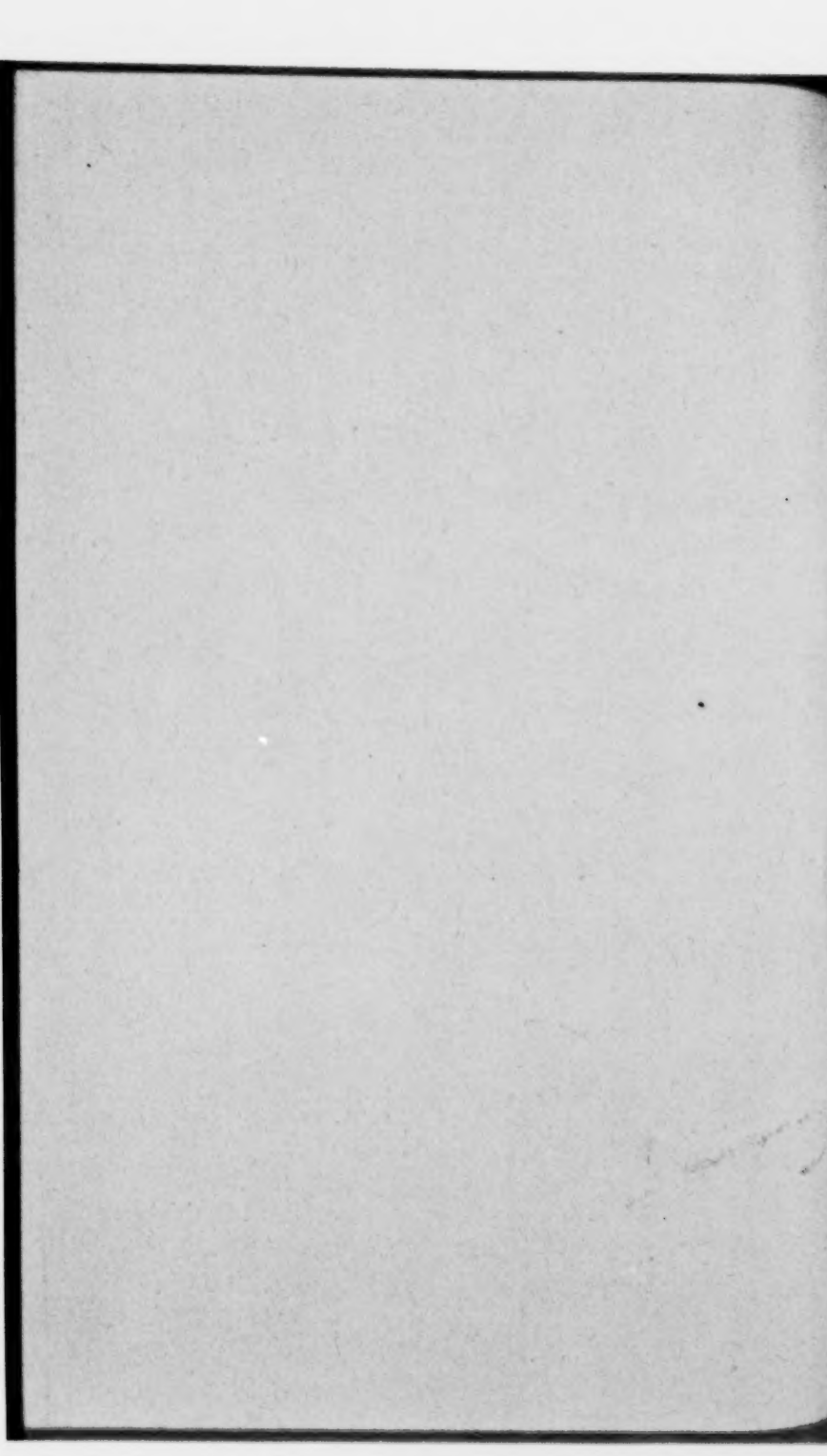
CHICAGO TITLE & TRUST COMPANY, Trustee in
Bankruptcy of EARL H. PRINCE, Bankrupt,

Appellee.

BRIEF AND ARGUMENT FOR APPELLEE.

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, Jr.,

COUNSEL FOR APPELLEE.

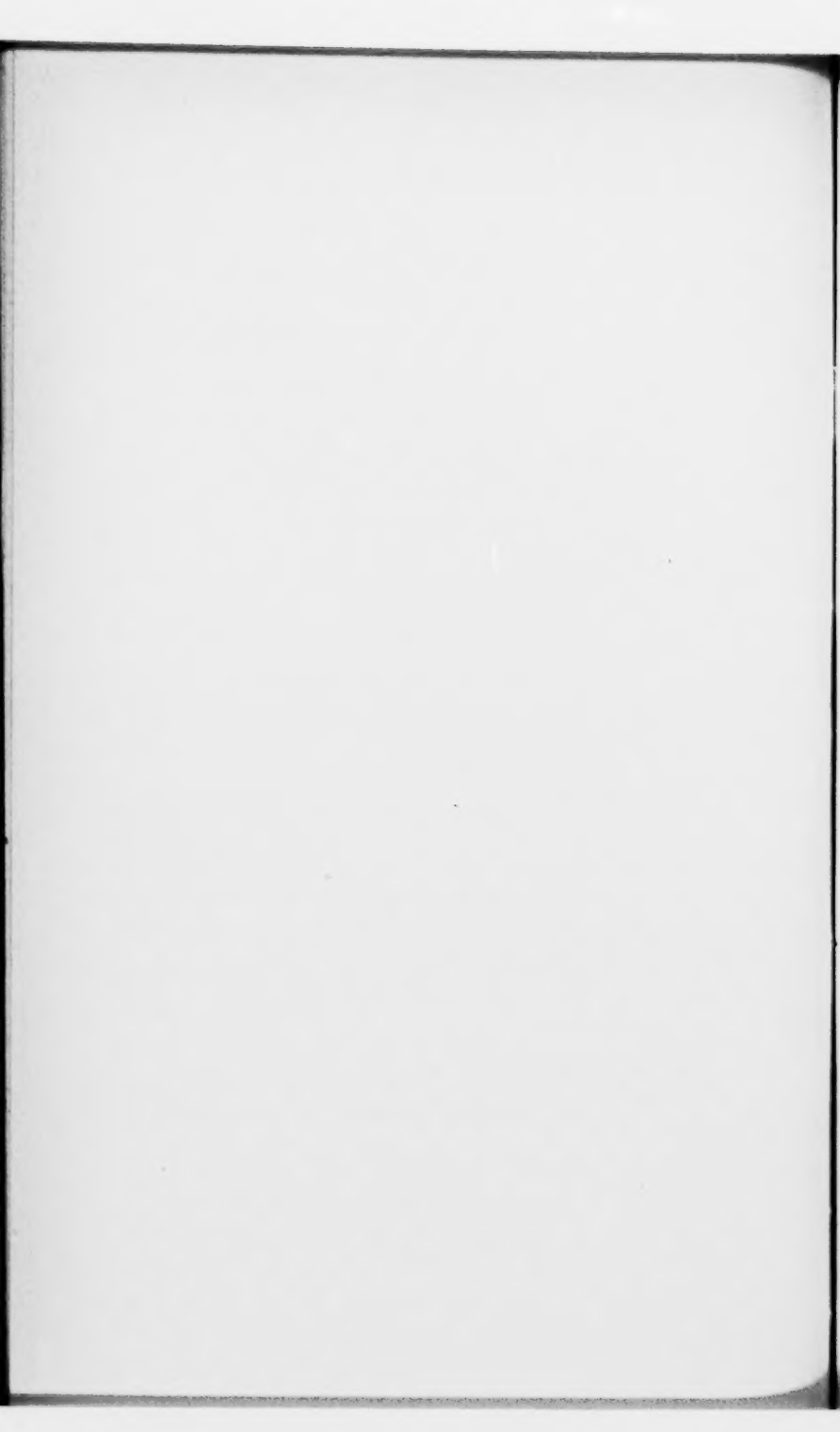


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CONTINENTAL & COMMERCIAL TRUST &
SAVINGS BANK,

Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, Trustee in
Bankruptcy of EARL H. PRINCE, Bankrupt,

Appellee.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF FACTS.

The facts upon which the decree appealed from was based were settled either by the written stipulations of the parties or by uncontradicted testimony produced by the appellee. Appellant offered no testimony whatever. The essential facts are as follows:

On February 15, 1905, a petition in bankruptcy was filed against Earl H. Prince. He was adjudicat-

ed bankrupt and appellee appointed trustee. His estate was woefully insolvent. He owed over \$100,000 to general creditors, and about \$1,000 in wages to employes. (Trans., 75.) The sale of his assets netted the trustee only \$1,180.83 (Trans., 79)—not enough to pay wage claims in full after deducting expenses of administration. He was a member of and operating as a broker on the Chicago Board of Trade. He was indebted to the Federal Trust and Savings Bank—since merged with appellant—on demand notes, in the sum of \$37,000—over one-third of his total liabilities. On February 10, 1905, the bank learned of some trouble between Prince and one Wolf about a \$24,000 certificate of deposit issued by the Parkersburg State Bank, and that the Parkersburg Bank disputed liability on it. (Trans., 43.) The bank thereupon, on February 10th, called all of Prince's loans, and, on his failure to pay, appropriated and applied on the debt a balance of \$3,095 then remaining to the credit of Prince in his deposit and checking account with the bank. (Trans., 76.)

The bank then agreed with Prince to pay certain specified salary, pay roll and Board of Trade Clearing House checks if Prince would thereafter deposit sufficient funds to cover the same. The total of such checks so agreed to be paid was \$2,506.46. But Prince deposited \$575.79 more than enough to cover the specified checks. Checks other than those specified were presented for payment in the meantime and payment refused by the bank. The deposits were made on February 10th, 11th and 14th, but were not credited to his account until February 14th, on

which day the bank made a second appropriation and applied the said \$575.79 on its debt. (Trans., 76.)

The rules of the Board of Trade provide (Trans., 5) that, on time contracts, commonly referred to as "open trades," purchasers and sellers may require of the other party to the trade, as security, a deposit of 10 per cent., based upon the contract price of the property bought or sold; that all securities shall be deposited either with the treasurer of the board or with some bank duly authorized by the directors to receive such deposits; that all banks which may be appointed to act as depositories for securities shall be required to have an executive officer member of the board, who shall be amenable to the rules of the board in matters of dispute arising from any transactions on the board between the banks and members of the board, and shall execute and file with the secretary a bond, with sureties, to be approved by the directors, for the proper disposal of such deposits, in accordance with the rules. The form of certificate to be issued by such depository as evidence of the deposit is fixed by the rules. They are required to be issued in duplicate, not transferable. They shall state "by whom the deposit is made, for whose security the same is held, that the deposit has been made under the rules of the board and is payable on return of the certificate or duplicate endorsed as provided by the rules. All deposits so made shall be held to have been made *as security* for the faithful fulfillment of any contracts between the parties during the time the deposit shall remain unpaid, but may be made applicable to a particular contract."

The defendant bank was such a Board of Trade depository. It had executed its bond to the board in the sum of \$50,000, conditioned as follows (Trans., 73):

“Whereas, the rules of the said Board of Trade provide for the making of deposits, as margins, and as security or further security upon time contracts between members of said Board; and,

“Whereas, persons concerned in such contracts, either as purchasers or sellers, or their representatives respectively, may hereafter, from time to time, desire to make such deposits with said Federal Trust and Savings Bank; and,

“Whereas, the said bank therefore desires to be authorized and qualified to act as a depository in such cases within the meaning of such rules, as they now exist, or may hereafter be altered or amended.

“Now, therefore, the condition of the foregoing obligation is such that if the said Federal Trust and Savings Bank of Chicago shall faithfully perform its duty in the premises in respect to the proper disposal of all such securities or margins, in accordance with the rules, regulations and by-laws of said Board of Trade, then this obligation shall be void, but otherwise the same shall remain in full force.”

Prince had a large number of such time contracts with other members of the Board of Trade, for the purchase and sale of grain and other commodities at various prices. A large number of these time contracts had profits of great value to Prince, and on others of said contracts there were liabilities under the prevailing market prices, to other members of the Board. By an agreed statement of facts stipulated to by the parties hereto, to use upon the hearing, it was admitted that on February 15th,

when Prince's trades were transferred as herein-after stated, the aggregate sum of the amounts due to Prince from members of the Board on trades under the market price then prevailing was greater than the aggregate sum of the amounts due from Prince to other members of the Board. (Trans., 72.) Previous to February 10th, Prince had made several deposits with the bank, as a Board of Trade depository, under the rules of the Board of Trade, as security on contracts between himself and other members of the Board. The total amount so deposited as security with the depository was \$4,250. It was further stipulated, as a fact, that if the margined or secured trades had been closed at the opening of the Board on February 15th, there would have been due to Prince from holders of such securities a balance of approximately one-third of the amount of the securities *after deducting the liability of Prince therefrom* (Trans., 72); in other words, that the amount of liability for which the deposits were made as security was approximately two-thirds of the amount of the securities. If the trades had been closed later in the day the liability of Prince would have been considerably more. (Trans., 73.) The parties were at liberty to introduce any evidence not inconsistent with the facts above admitted, and on the hearing Mr. Anderson, president of one of the defendants, testified that in his judgment very likely the whole of the securities would have been wiped out in satisfying the liability of Prince to the holders, if the trades had not been transferred. (Trans., 62.)

Prince was in the bank every day after February 10th in conference with Mr. Castle, its vice-president.

(Trans., 41.) On February 14th Mr. Castle called W. P. Anderson, president of W. P. Anderson & Co., also a member of the Board of Trade, to come to the bank, and there informed him that Prince was in financial difficulties and was about to quit business. Mr. Anderson was asked for advice in regard to the winding up of Prince's affairs on the Board of Trade. Castle believed Prince to be insolvent. (Trans., 42.) Anderson was requested to look into the matter of Prince's trades for the bank. He and his partner and Mr. Castle, the vice-president of the bank, and Mr. Scheidenhelm, the cashier of the bank, were down at the office of W. P. Anderson & Co. as late as 11:30 at night on February 14th. A list of Prince's trades had been furnished, and they were looked over, and Mr. Anderson informed Castle that it looked as if it was all right, *and Mr. Castle requested him to take the trades over.* (Trans., 51.) The trades showed that after charging commissions upon the transaction, required under the rules of the Board, there would be a small loss in the trades; *Mr. Castle guaranteed W. P. Anderson & Co. that small loss.* (Trans., 52.) The trades were transferred to Anderson & Co. the next day. Prince's open trades or time contracts were about even on the Board; that is, he had about the same number of bushels of various commodities bought as he had sold. Under an agreement between the parties, W. P. Anderson & Co. immediately bought or sold enough on the Board to evenly balance the trades. Thereafter, Anderson & Co. settled the trades in their ordinary course of business, by collecting from various members of the Board the amounts that

were due thereon, and by paying to other members of the Board the liabilities that had been Prince's thereon. At the time the trades were transferred Prince delivered to Anderson the certificates evidencing the margin deposits; Anderson secured their endorsement and delivered them to the bank on the same day that the petition in bankruptcy was filed. The bank thereupon applied the sums so deposited with it as a Board of Trade depository upon the debt of Prince to it as a bank, pursuant to an understanding with Prince and Anderson. (Trans., 41.)

The bill of complaint herein was filed against the bank and W. P. Anderson & Co., but was afterwards dismissed as to Anderson & Co. The bill charged that the transfer of the trades to Anderson, and the settlement by Anderson of the trades of the members who held securities, and the withdrawal of the securities from the escrow or trust under which they were held by the bank, as a Board of Trade depository, and the application of the sums to the debt, had the effect of enabling the bank to obtain a greater percentage of its debt than other creditors of the same class, and that the bank had reasonable cause to believe that a preference was thereby intended. (Trans., 8, par. VII, VIII.) The prayer for relief in the bill contained a specific prayer that the transfer of the said time contracts be decreed to be a fraud; that the application of the securities be decreed to be a preference, and a general prayer for all other proper relief; other relief prayed for in the bill is not here in question. Later an amendment to the bill was filed to recover the \$575.79 as a preference.

The court below held that the \$4,250 margins so deposited with the bank, as a Board of Trade depository, were not general deposits made under the law or customs of bankers, were not debts of the bank to Prince, but were special deposits (Trans., 94); that the deposits made after February 10th were not made in the usual course of business, but were made under such special circumstances that the appropriation of the balance of \$575.79 was a preference.

The master found as a fact (Trans., 94) that the \$4,250 was held by the bank on special deposit. No objection or exception to this finding of fact was taken by appellant.

The master also found (Trans., 94) that on February 10, 1905, "Mr. Castle, the vice-president of the bank, and Mr. Prince, the insolvent, undertook to so shape and control Prince's affairs and business that all these moneys might be acquired by the bank and applied on Prince's indebtedness, and this, too, with every reason to believe that bankruptcy would soon overtake Prince. From February 10th on until the involuntary petition was filed against Prince, Prince and Castle operated together to bring about this result, etc."

The master further found that

"The conduct of Prince's affairs for the five days preceding the filing of the petition against him is of such a character as to exclude every other conclusion except that it was the intention of both Prince and Castle to reduce Prince's indebtedness to the bank as much as possible, by applying thereon all his available assets and by

so disposing of his open trades on the Board as to realize the greatest possible amount for the bank to the exclusion of his other creditors." (Trans., 95.)

The court sustained these findings of the master, and counsel for appellant have not specified them among the errors relied on, and do not question the findings in their brief.

A decree was entered against the bank for the payment of the said sums, with interest at 5 per cent. from the date their payment was demanded by the trustee. All questions as to jurisdiction of an equity court to grant the relief were waived by agreement of the parties. (Trans., 100.)

The bank appealed to the Circuit Court of Appeals, where their counsel contended mainly, if not entirely, that the above deposits were made and carried on in the ordinary relation of debtor and creditor and were therefore a proper subject of set-off under Section 68 of the Bankruptcy Act.

BRIEF OF ARGUMENT.

I.

AS TO PREFERENCES.

The transfer of the bankrupt's "open trades" to Anderson was a transfer of property for the benefit of the bank.

Nat. Bank of Newport v. Nat. Herkimer Co. Bank, 32 Sup. Ct. R. 633. Banker Act, Chap. 1, Sec. 1 (25).

A preferential transfer includes every mode of disposing of property for the benefit of a creditor, and circuitry of arrangement will not avail to save it.

Nat. Bank of Newport v. Nat. Herkimer Co. Bank, 32 Sup. Ct., R. 633.

Western Tie Co. v. Brown, 196 U. S. 502.

Hackney v. Hargraves, 99 N. W. 675.

The endorsement and delivery of the margin certificate to the bank was a transfer of the amounts of the margin securities held by the bank as a Board of Trade depository, to the bank as a creditor, and was a payment.

Trader's Nat. Bank v. Campbell, 14 Wall. 87.

Ridge Ave. Sav. Bank v. Studheim, 145 Fed. 798 (C. C. A.).

Lowell v. Trust Co., 158 Fed. 781.

Irish v. Citizens Trust Co., 163 Fed. 880.

The deposit of more than enough to pay the specified checks under the special deposit arrangement was a preferential transfer.

N. Y. County Bank v. Massey, 192 U. S. 138.

Western Tie Co. v. Brown, 196 U. S. 502.

II.

AS TO THE RIGHT OF SET-OFF.

There was no right of set-off as to the margin securities, because the same were deposited, *as security*, with the bank in its capacity as a Board of Trade depository, and not according to the custom of banks. They were special or specific deposits, and not general deposits, and created a trust relation and not a relation of debtor and creditor.

Bolles on Banking, Sec. 3.

Morse on Banking, Sec. 185.

Woodhouse v. Crandall, 197 Ill. 104.

Montague v. Pacific Bank, 81 Fed. 602.

Moreland v. Brown, 86 Fed. 257.

Peck v. Ellicott, 30 Kan. 156, 1 Pac. 499.

People v. Bank, 96 N. Y. 92.

Anderson v. Pacific Bank, 112 Cal. 598; 44 Pac. 1,063.

Libby v. Hopkins, 104 U. S. 303.

Collins v. State, 33 Fla. 439.

Shoperts v. Indiana State Bank, 83 U. S. 515.

A bank has no lien or right of set-off against special deposits or money deposited for a specific pur-

pose, as for collateral security or for the payment of a particular debt.

3 Am. & Eng. Enc. L., 822, 837, 2nd Ed., 5 Cyc. 552.

Morse on Banking, Sec. 325.

Reynes v. Dumont, 130 U. S. 390.

Wagner v. Citizens Trust Co., 122 S. W. 245.

Smith v. Sanborn State Bank, 126 N. W. 779.

Dolph v. Cross, 133 N. W. 667.

In re Davis, 119 Fed. 950.

Germania Sav. Bk. v. Loeb, 188 Fed. 285.

Western Tie Co. v. Brown, 196 U. S. 502.

Scott v. Armstrong, 146 U. S. 499.

Gray v. Rollo, 18 Wall. 632.

Munger v. Albany City Bank, 85 N. Y. 589.

Rawleigh v. Rawleigh, 35 Ill. 512.

There was no right of set-off as to the \$575.79, because it was not treated by the parties as a general deposit, but was made "under special circumstances" amounting to a special deposit.

N. Y. County Bank v. Massey.

Western Tie Co. v. Brown.

Germania Sav. Bank. v. Loeb.

III.

AS TO THE APPLICATION OF SEC. 68 B.

The bank and bankrupt were in collusion to turn all the bankrupt's available assets over for the benefit of the bank. The alleged right of set-off was acquired with a view to such use. .

Western Tie Co. v. Brown.

National Security Bank v. Butler, 129 U. S. 223.

Yardly v. Philler, 167 U. S. 344, 359.

ARGUMENT.

Before discussing the question involved we wish to comment briefly on appellant's caricature of the "theory of the bill of complaint" exhibited in their statement of case (p. 6). Their alleged theory of the bill is evolved from their imagination, and we do not recognize it as anything we are responsible for. Our theory has always been that the bank received voidable preferences of the amounts of the margin deposits of \$4,250 and the special deposit of \$579.75, and that there was no right of set-off of these amounts against the bank's debt. The bank understood this when demand was made by the trustee for said amounts as preferences. (Trans., 80.) Learned counsel for appellant apparently comprehended our theory when they answered the bill, denying that the application of said sums were preferences and setting up the right of set-off. This is the theory on which the case was tried, and is the only theory supported by the pleadings and the evidence. Anderson & Co. was made defendant for the purpose of discovery as to the trades transferred, and for recovery if there had remained anything in its hands after satisfying Prince's losses out of his profits. When, by stipulation, all the facts necessary to a recovery against the bank were agreed upon, and it appeared Anderson & Co. received nothing on account of the transfer except legitimate commissions as brokers, it was properly dismissed out of the case.

The bill prayed specifically that the application of the funds to the debt of the bank be decreed to be a preference, and for general relief. (Trans., 11.) It is true the prayer for relief contained an unnecessary and inappropriate reference to subrogation. However, the color of a horse is not determined by that of its ears alone.

We shall discuss, first, the question of preferences, (a) relating to the margin deposits, (b) relating to the \$575.79; second, the right of set-off, under the same subdivisions; and, third, the application of Sec. 68 B of the Bankruptcy Act.

I.

AS TO PREFERENCES.

The law covering preferential transfers applicable to the admitted facts, is fully stated in *National Bank of Newport v. National Herkimer County Bank*, 32 Sup. Ct. Rep. 633, from which we quote as follows:

“To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than others of his creditors of the same class, circuitry of arrangement will not avail to save it. A ‘transfer’ includes ‘the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.’ It is not the mere form or method of the transaction that the act condemns, but the appropri-

tion by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The 'accounts receivable' of the debtor, that is, the amounts owing to him on open account, are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account,—the same to constitute a payment in whole or part of the latter's debt,—or he collects the amount and pays it over to his creditor directly. This implies that in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor.

But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer, *Western Tie & L. Co. v. Brown*, 196 U. S. 502, 509; 49 L. Ed. 571, 574; 25 Sup. Ct. Rep. 289. 'These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor, and the consequent diminution of the bankrupt's estate.' *New York County National Bank v. Massey*, 192 U. S. 138, 147; 48 L. Ed. 380, 384; 24 Sup. Ct. Rep. 199."

(a) *Relating to the Margin Securities.*

Whether the transfer of Prince's time contracts to Anderson & Co., which released the margin securities from their pledge, and the application of same on the

bank's debt constituted a preference, involves the consideration of three questions. (1) Was there a transfer of the bankrupt's property? (2) Was the bank benefited by the transfer? and (3) Was the estate of the bankrupt thereby diminished? It is not disputed that the bank had knowledge of Prince's insolvency.

Under the method of doing business on the Board, where three or more parties have sold the same amount of a certain commodity, for illustration, where A has sold to B 5,000 May wheat, and B has sold a like amount to C, and C has in turn sold a like amount to A, instead of waiting until settlement day, May 31st, and then delivering or settling the trades, the parties may agree to a canceling of the obligation to make the deliveries, by what is known as a "ring." Settlement prices are established by the Board every day, which settlement prices are the current market prices. Adjustments of the amounts that are due to the several parties to these rings are made through the agency of the Board of Trade Clearing House, on the basis of the difference between the market or settlement price and the contract price. This Clearing House is merely a convenient agent or representative of the members of the Board for the purpose of collecting for each member of the Board the sums that are due him from the other members. There is no question involved in these clearings of set-off between any two members of the Board. It is only the net amount that is due to or from a member after they have set off their mutual claims that goes through the Clearing House. The legal result of the Clearing House transaction may be thus explained:

The Clearing House as A's agent collects what is due to A from B, and as A's agent pays from said amount what A owes to C. If Prince had himself settled his Board of Trade transactions, he would, through the medium of the Clearing House, have collected the various sums of money that were due to him, and through the same medium he would have paid these sums over to his Board of Trade creditors. The result would be the same in legal effect if, without the intervention of the Clearing House or "rings" he had closed his trades and collected the various amounts that were due to him on his profitable contracts, and out of the proceeds had paid what he owed to other members of the Board. Under the terms of his open trades and the rules of the Board these open contracts became mature accounts receivable or accounts payable on settlement day, *i. e.*, May 31st for May wheat, etc., or before, if closed by a "ring." The obligations on these open trades were no different in legal effect from the liability on merchandise accounts receivable and payable. Suppose that Prince's obligations on his open trades had been so much larger than his profits that Anderson would have refused to accept a transfer. Of course, as he testified, he would not have accepted the transfer unless there had been sufficient profit, or nearly so, in some of the trades to take care of the liabilities on the other trades. If the trades had been closed out by Prince and the members, instead of being transferred, then those members who had no securities would have had no recourse except to file their claims in the bankruptcy court. If Prince had transferred some of his accounts receivable from

non-members of the Board to a third person, upon condition that out of the same he pay some accounts payable to non-members, it will not be denied that the trustee acting for the Board of Trade creditors as well as for others, could set the transfer aside as preferential and recover from the recipient of the preference. It must be borne in mind that the facts as stipulated by the parties (Trans., 72) and found by the master (Trans., 89) show that the sums that were due to Prince on his open trades were not from the same members to whom Prince was indebted, but that the sums were due to him from *other* members of the Board. The situation is simplified by supposing that Prince had only two open trades—one with Peter, which had a value to Prince of \$10,000, and another with Paul, under which Prince was liable to Paul for \$10,000. There is no reason why, if Prince was looking out solely for his own interests or the interests of all creditors alike, he could not sell or assign to some member of the Board his contract with Peter and have received its value. It was not necessary for him to assign it for the sole benefit of Paul and direct that the sum received from Peter be paid to Paul, either for Paul's benefit or the benefit of a bank holding funds deposited in escrow for Paul's security. That is precisely what was done in this case.

Some of Prince's time contracts were assets and others were liabilities. Those trades or contracts which, according to the prevailing market price, showed a profit to him, were assets, and those that showed losses were liabilities. His profitable trades were unquestionably "property" within the mean-

ing of the bankruptcy law. It was found by the master upon the stipulated facts that the value of his profitable trades was in excess of his liabilities on the other trades. The transfer of his trades to Anderson was a transfer of property. When Anderson collected the amounts due on the profitable trades and paid therefrom the liabilities on the other trades, there was necessarily a depletion or diminishment of Prince's estate. It did not diminish his *net* estate when part of his assets were applied in the payment of a like amount of his liabilities, but this is not the test of a preferential transfer. Any preferential transfer by way of payment or otherwise does not diminish the *net* estate. The proper test is whether the *gross* estate is depleted. The agreed facts show that the gross estate was depleted. To bring the case within the law as above set forth, therefore, it remains only to determine whether or not the bank was benefited by the transfer.

The deposits with the bank as security for the benefit of the members of the Board, who demanded them, were unquestionably transfers within the meaning of the definition of "transfer" in the bankruptcy law. It is not these transfer, however, that are attacked in this proceeding. They were made in good faith before bankruptcy. It can hardly be questioned that the delivery of money to a depository to be held as security for a debt is a "transfer conditionally, by way of pledge, mortgage or security," to the person so secured. If Prince had transferred any property direct to the possession of another member of the board as security for an obligation, it would be such a transfer, by way of pledge. It can

make no difference that the transfer is to an agent or depository or escrow holder of the parties for the same purpose. He thereby parts with the possession of property by way of security. Prince did not have the right to demand the money from the bank after it had been so pledged or deposited with it. He could not have drawn checks against it, nor could he have maintained a suit at law for it. It was necessarily a conditional diminution of his estate to the amount so deposited. The rules of the Board of Trade regarding margins were enacted for no other purpose than to compel a member indebted to another to take out of his general assets, which any creditor might resort to by legal process, or which his banker might, perchance, appropriate by way of set-off, sufficient to secure a member desiring such security.

The transfer was not to the bank or for its benefit, but to or for the benefit of the secured Board of Trade member. The Board of Trade members whose claims against Prince were secured in this manner had a perfect right to look to the security in the event of Prince's default, and in accepting the benefit of the transfer to Anderson and in releasing their security on being paid by Anderson, they did not receive a preference.

The taking up of the securities and endorsing and delivering them to the bank was a transfer of property within the meaning of the law. If we are correct in our assumption that the depositing of moneys as security for members of the board to whom Prince was indebted was a transfer, conditionally, by way of security, to such creditor, then it neces-

sarily follows that, when Prince transferred the securities or deposits to the bank, as his creditor, by his voluntary action in turning the certificates over to Anderson, who delivered them to the bank pursuant to an understanding that this was to be done, there was a "transfer or parting with property absolutely, by way of payment." The fact that the deposits were payable upon return of the certificates duly endorsed by the president of the board, or both parties, was merely a convenient method of transferring the deposit or security to the person entitled thereto. The legal effect of the transaction, under which the certificates were endorsed and turned over to Mr. Anderson, and by him delivered to the bank for credit on Prince's debt, was the same as if Prince and the secured parties had executed a formal assignment of all their right, title and interest to the sums deposited and had directed their payment on Prince's debt. The certificates were payable only on the return of the same, or duplicate, duly endorsed by both parties, or by the president, etc. Anderson testified (Trans., 56) that when the trades were transferred the margin certificates were endorsed and by him handed to the bank. The bank did not rely upon a right of set-off. It was an active agent in inducing a transfer of the trades; the certificates were delivered to Anderson as a part of the transaction; the bank accepted the certificates from Anderson as representative of Prince, and credited the amount on its debt as a payment.

Even if the deposits made by Prince had been of the kind commonly evidenced by ordinary certificates of deposit, or promissory notes of the banker,

payable on demand, which were being held by another as security for a debt of the bankrupt, and the bank through collusion had induced the bankrupt to pay the holder of the certificates, so that the bankrupt himself again became possessed of them, and had induced him to deliver the certificates of deposit for payment on its debt, the transaction would have come fully within the rule laid down in *Traders Bank v. Campbell*, 14 Wall. 87. In that case the bank held a judgment note of the bankrupt and the bankrupt had \$335.25 on deposit. The court say:

“Before the bank caused the judgment to be entered up they credited this amount on the note and took judgment for that much less. They now assert that this was what they had a right to do and that it should remain a valid set-off. But this does not appear really what was done. It appears that Hitchcock & Endicott gave the bank a check for the sum, and by virtue of that check it was endorsed on the note as payment. Now, as both the bank and the bankrupts knew of the insolvency of the latter, this was a payment by way of preference and therefore void by the 35th section of the bankrupt act. In this case as in the other, if they had stood on their right of set-off, it might possibly have been available, but when they treat it as the bankrupts’ property, and endeavor to secure an illegal preference by getting the bankrupts to make a payment in the one case, and seizing it by execution in the other, when they knew of the insolvency, both appropriations are void.”

It takes two parties to accomplish an effectual payment, both a payor and a payee. One party alone can exercise the right of set-off without the consent or assistance of the other.

In *Lowell v. Trust Company*, 158 Fed. 781, no check against his account was given by the bankrupt to the bank, nor did he take any active part whatever in transferring or applying the deposit. It was done by the bank of its own motion, by way of set-off, and the only holding of the court was that it did not make any difference whether the set-off was exercised before or after petition in bankruptcy was filed. *Traders Bank v. Campbell* is cited with apparent approval. It was conceded that there was no payment, because the bank alone was the active party in the transaction. The court says:

"It takes two parties to accomplish an effectual payment, both a payor and payee."

In the case at bar when Prince transferred his trades to Anderson, and endorsed and delivered to him the margin certificates, with the understanding that they were to be delivered by Anderson to the bank to apply on his debt, there were two parties to the transaction. Prince became a payor and was a voluntary party to the transfer of his margin securities to the bank. It could not have been done without his consent and assistance.

In *Irish v. Citizens Trust Company*, 163 Fed. 880, the court, commenting on *Bank v. Massey*, in reference to the right of set-off, said:

"But such is not this case. The furniture company checked out the money, all of it so far as involved here, and by checks on the account transferred it to the trust company as payment of notes, with intent to prefer it, and it was so accepted as payment of such notes."

Ridge Ave. Bank v. Studheim, 145 Federal 798, was decided by the Circuit Court of Appeals for the Third Circuit nearly two and a half years after the decision in *Bank v. Massey*, and it can be assumed that the court was familiar with that case, although it is not referred to. That court applied the law in the same way as was done in the case of *Traders Bank v. Campbell*. The same contention was made there as is made here. The bankrupt, while known by the bank to be insolvent, gave a check against his account with the bank, in part payment of a debt to the bank. The trustee sued to recover as a preference. Counsel for the bank stated that they claimed right of set-off, as here. The court say:

“The mere reading of this statement, however, shows it is inapplicable to the case at bar. This is not the case of a deposit remaining to the credit of a bankrupt estate at the time of the filing of a petition of bankruptcy, which under certain circumstances, and in the absence of collusion, might be the subject of set-off, but is rather that of a transfer to a bank of a portion of the bankrupt’s estate by the bankrupt’s own act, prior to the bankruptcy, and which was accepted by the bank in partial payment of an unmatured claim, and concerning which transaction the jury has said the bank had reasonable cause to believe at the time the payment was made, that it was accepting preference. It seems wholly unnecessary to add anything further on this point.”

In *Bank v. Massey*, the court cited *Traders Bank v. Campbell*, and distinguished it, but did not criticize it.

In the case at bar Prince’s voluntary action in endorsing the certificates over to Anderson for de-

livery to the bank by way of payment, and their acceptance of the same, and applying the amounts on the debt before the petition was filed, is of the same legal effect as the drawing of a check against a checking account, and comes squarely within the reason of the foregoing cases.

Anderson & Company did not receive any benefit from the transfer beyond the incidental benefit of a nominal commission provided by the rules of the Board of Trade for making the transfer. They paid over whatever they received on Prince's profitable trades to the members to whom Prince was liable and who held securities. They were merely acting as Prince's representative in making the transfer. No recovery could be had against them. The bank alone was benefited by the transfer.

The finding of the master that the transfer of the trades to Anderson was doubtless the best plan that could have been adopted to avoid serious loss to Prince and his creditors, and that a panic *might* have ensued on the board if it had not been done, and that the margin securities would have been lost to Prince and his creditors, has no bearing on the liability growing out of what *actually* happened. What *might* have happened is pure conjecture. What would have happened to the margin securities if no transfer had been made is of no interest.

This finding, however, is not tantamount to saying that there was no diminution of Prince's estate. While all the margin securities, under the stipulated facts, would have been lost, or, in other words, while Prince owed to the members of the board holding margin securities as much or more than the

amount of the securities, and they would have been compelled to exhaust all the securities, there is no finding that the profits on those trades that were profitable to Prince—which were his assets—would have been wiped out or lost. On the contrary, the stipulated facts show that Anderson collected sufficient from those profitable contracts to pay in full the indebtedness of Prince to those members who held the securities. The sums that were due to Prince on his open trades were not due from the same members to whom Prince was indebted, but such sums were due to him from *other* members of the board. Therefore, the bankrupt's estate was diminished to the extent of the value of the profitable trades, and was benefited to the extent that, by exercising his right to redeem the margin securities, his estate was placed in position to demand back the securities previously pledged for the benefit of the members of the board who held them, and was again depleted when he transferred the margin deposits to the bank as a payment.

Leaving the bank out of consideration for the moment, and assuming that it had not been a creditor of Prince, and had had nothing to gain one way or the other in the transaction, then Prince, in closing up his affairs on the Board of Trade, for his own benefit, and that of his creditors generally, was free to follow either of two desirable courses: First, he could transfer his profitable trades and receive the consideration therefor, leaving the other members of the Board to whom he was indebted, including those who held securities, to collect the amounts due them either from their securities or by filing claim

in the bankruptcy court. It was entirely feasible, as well as legitimate and proper, for him to have transferred his profitable trades only. Second, if the margin securities amounted to as much or more than the profits due him on his profitable trades, then, to save the deposits he could transfer *all* his trades, that is, profitable trades, for the purpose of paying therefrom his liabilities on other trades, and thus again become entitled to the deposits. In either event there would necessarily be a transfer of some of his property. If he had transferred the proceeds of the sale in the first instance to the bank, its character as a preference would be admitted. In the second instance, the form of the transaction is somewhat changed, but the effect is the same.

There is no evidence in the record that the possibility of a panic resulting from Prince's failure was talked of at the time the transfer was made. The only reference to a panic is an irresponsive suggestion offered by Anderson on examination that certain conditions *might* have obtained, the importance of Prince's transactions *might* have been exaggerated, and as a result a panic *might* have followed. (Trans., 62.) It was not to avoid a panic that the transfer was made, but solely, or at least principally, to enable the bank to apply the margin securities. Castle, the bank's vice president, was asked (Trans., 41), "Had you agreed with Mr. Prince at the time you undertook the closing out of the trades, proceeds of the sale would be paid to the bank?" He replied, "I didn't understand any agreement was necessary; we expected him to do that, certainly." That such was the intention of the parties was demonstrated by their actions.

Anderson accepted the transfer of Prince's trades after he found that there was profit enough or nearly enough in some of them to pay the losses on the others, including those who held securities. The bank knew all the circumstances, it requested Anderson to take the transfer, and even guaranteed him against a loss, should there be any. Under the agreed facts, it is entirely immaterial what might or would have occurred if the transfer had not been made. An insolvent merchant about to go into bankruptcy might sell out his entire business at its actual value as a going concern, whereas if sold after bankruptcy it would be sold at a great loss. However, if out of the proceeds of such sale any particular creditors were favored by the purchaser assuming and paying the debts as a part of the purchase price, it would be a preference, notwithstanding the advantageous effect of the transaction in other particulars.

(b) *Relating to the \$575.79.*

The stipulated facts show that the bank agreed to pay certain specified checks, the amounts of which are set forth in the stipulation, if Prince would *thereafter* make deposits of sufficient funds to cover same. The deposits were not made until after the checks had been paid. *Other checks, except those specified, were refused payment by the bank.* The exact amount that he was obliged to deposit under his agreement was readily ascertainable. In view of the fact that Prince was so hopelessly insolvent that the trustee, as shown by the stipulation of facts, has not enough on hand to pay even wage claims, we do not think that the bank ought to be permitted to

profit by the over-payment on the theory that it was merely an accident, or mistake in addition, on the part of Prince, as suggested in appellant's argument. There is no evidence to bear out the suggestion. There is no evidence that other salary checks than those specified were drawn by Prince. The agreement was not to pay *all* checks given to a particular class of creditors, but certain specified checks. Prince, in fact, did deposit a larger sum of money than was necessary to pay these checks, and he cannot be heard to say that he did not intend to do so, and as the necessary consequence of the act was to enable the bank to receive a larger portion of its debt than the other creditors, the law conclusively finds it to be a preference. When the bank is permitted to retain the amount of Prince's general checking balance, which was applied on February 10th, it had all the advantage it was entitled to under the rule announced in *Bank v. Massey*. That case should not be extended beyond the reasons given for its decision.

The bank had appropriated the balance due on his general deposit account, and he thereafter had no general account. He simply agreed to deposit enough money to pay certain specified checks. He was not under obligation to deposit any more than sufficient for that purpose, and had no right to deposit more, when his other checks previously drawn were refused payment by the bank, thus showing that he did not have control over amounts deposited by him, such as is the case in a general deposit account. The amounts brought in by him were not entered to his credit on the books of the bank when

they were received by the bank, but were held by the bank as cash items, so that his account during the several days immediately preceding the failure showed a continual overdraft.

We doubt if these "deposits" were properly so called, in view of the fact that they were not passed to the credit of Prince when made, but were held until the bank wound up its relations with Prince and then put through the form of a credit to him.

The case of *Bank v. Massey* specifically excepts from the scope of its decision deposits made "under special circumstances." If the bankrupt under these particular circumstances and under this special arrangement could deposit \$575 more than enough to pay the specified checks, he could so deposit \$5,000. The necessary result of the transaction was to transfer the amount stated from Prince to the bank, and necessarily was a preference. Counsel contended that there was no intent on the part of Prince or the bank to create a preference by this special arrangement. The necessary effect of the transaction was that the bank, by the so-called depositing of the excess over the amount of the agreed checks, and its refusal to honor other checks than those specified, got a greater percentage of its debt than other creditors. Where the transaction has that effect, and the party receiving the benefit of it has knowledge of the insolvency, then the law will conclusively presume that he intended the necessary consequences of his act, and he cannot be heard to say that he did not so intend it. The case of *Western Tie Co. v. Brown* is conclusive on this point. The court there say:

"If Harrison, being insolvent to the knowledge of the company, within the prescribed period gave to the Tie Company authority to collect the sums due to him from the laborers for goods sold them, with the right or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intent to bring out the result necessarily arising from the nature of the act which he did."

On the day before the petition in bankruptcy was filed Prince made two deposits, the first of \$820 and the second of \$499. The first was more than enough to cover the checks paid. The bank was, on that day, making strenuous efforts to shape the bankrupt's affairs to its own advantage. It knew that a petition in bankruptcy was being prepared. That the transfer of the money to the bank, under these circumstances, took the form of a deposit in a bank account that had already been foreclosed by the bank only four days previously, and against which checks previously drawn were being dishonored, cannot avail to change its character as a preferential transfer. Were a contrary rule to prevail, a bank could place itself beyond the bankruptcy law by accepting the funds of an insolvent, giving the transaction the form of a credit on his deposit account, but denying the effect by refusing to honor checks against it, and immediately appropriating it by way of set-off.

II.

AS TO THE RIGHT OF SET-OFF.

The contention of the bank's counsel is that, notwithstanding the circumstances under which the margin securities and the \$575.79 were applied in payment of its debt, the bank now has the right of set-off against its debt. This point has been settled beyond controversy by previous decisions of this court.

If the transfer of the margin securities held by the bank as a Board of Trade depository to the bank as a creditor, and the transfer of the \$575.79 by way of deposit, were preferential transfers, the sums so received as payments cannot be retained as a set-off.

But even though no preferences were involved, there could be no set-off, either as to the margin securities or the \$575.79, under the rule announced in *Western Tie & L. Co. v. Brown*, 196 U. S. 502.

(a) *Relating to the margin deposits.*

The Federal Trust and Savings Bank sustained a dual relation in these transactions. It was a banking institution sustaining the relation of banker and depositor, or debtor and creditor, as to Prince, on his general checking account with it. The other relation was that of a Board of Trade depository, which was a trust or fiduciary relation, and not a relation of debtor and creditor. The mere fact that the depository selected by the members of the Board of Trade happened to be at the same time a banking

institution, would not change the relation growing out of these margin deposits into that of banker and depositor or debtor and creditor. No one would contend that if these margin deposits had been deposited with the treasurer of the Board of Trade, instead of a bank, as was permissible under the rules of the Board, the treasurer of the Board of Trade would have had a right to use the funds as his own or as those of the Board of Trade. The relation of debtor and creditor would not have been established by such a transaction. Whatever institution or individual held deposits made under the rules of the Board of Trade, held them as a depository or trustee, or agent, and not as a debtor.

In *People v. City Bank of Rochester*, 96 N. Y. 32, the court recognizes that a banker may sustain a dual relation in regard to funds in its possession, the court saying:

“The transaction in question was not between the bank and Sartwell in their relation of debtor and creditor, nor in their relation of bank and depositor. The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus was a trust created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled.” (Citing *Libby v. Hopkins*, 104 U. S. 303.)

“The checks of petitioner were money assets in the hands of the bank, and were so treated by all parties. They were delivered to it with explicit directions to apply the proceeds on the payment of the notes. These directions were assented to by the bank officials and the checks

collected from the general funds. From that moment the bank was bound to hold the money for and apply it to that purpose and no other, or, failing to do so, return it to the petitioner. As to it, the bank was bailee or trustee, but never owner."

In a similar case in *Peak v. Ellicott*, 30 Kas. 156, the court says:

"When the bank, through its cashier, accepted the \$782.50, it was not paid by plaintiff as a deposit, nor accepted by the latter as a deposit, nor was the relation of debtor and creditor between the bank and plaintiff created by the transaction. On the other hand, as respecting this specific sum, the relations between the parties must be regarded as that of principal and agent. After the bank received this sum to satisfy the note of the plaintiff the bank held the money in a fiduciary capacity; if the money was not applied according to the understanding of the parties to the satisfaction of the note, it should have been returned to the plaintiff. It was not deposited to be checked out or to be loaned, or otherwise used by the bank; in law the bank held it as a trust fund and not as assets of the bank."

The margin certificates evidencing the agreement under which deposits were made, were the certificates of the bank in its relation as a Board of Trade depository, and not as a banking institution. The deposits were not made as a loan to the bank, and were not made according to usages and customs of banking institutions. It is conceded that the deposits created no relation of debtor and creditor between the bank and Prince at the time they were made; the certificates recite that the deposits were made *as security* for contracts between depositor

and another member of the Board of Trade, payable when endorsed, "*as provided by the rules of the Board of Trade, under which the above named deposit has been made*"; the rules of the Board of Trade were thus made by reference a part of the agreement between the bank and the other parties to the agreement. As further indicating that the relation was in no sense of banker and depositor, but that the relation of the bank was that of a depository, or trustee, the bank gave its bond with sureties reciting that it had been appointed a Board of Trade depository and conditioned for the proper deposition of such securities, in accordance with the rules, regulations and by-laws of the association. We think it must be conceded that as to these margin deposits the bank had no greater right than any other trustee or agent dealing with a principal's property. The mere fact that the depository was at the same time a banking institution certainly did not give it a right to mingle such trust funds with its general assets as a bank. The deposits were not loaned to the bank to be used by the bank as it saw fit along with its own resources, but were left with the bank as security, and it was the duty of the bank to keep the funds intact for that purpose.

The certificates were not "*purchased,*" nor were the "*certificates themselves pledged.*" The certificates were non-negotiable and non-transferable, and had no value in themselves, being merely the evidence of the contract or terms under which the money was held by it as a depository. The funds deposited were the pledge. Under the Board's rule XX (Trans., 5), the security is *deposited with the*

bank, not issued by the bank, and is payable on the return of the certificate.

If these deposits were moneys transferred or deposited as security, so far as the other members of the Board were concerned, they certainly were of the same character as far as Prince was concerned, and as far as the bank was concerned. When the other parties to the secured contracts were satisfied, Prince had a right to demand back, not moneys loaned by him to the bank as a general deposit, but sums specially deposited as security. The deposits never changed their character as security. They were put there as a trust fund, and they were payable as a trust fund.

If the margin certificates had been presented for payment by members of the Board to whom they were given as evidence of the deposits for their security, the obligation of the bank would have been that of a trustee or depository, and not that of a debtor. On the other hand, if they had been presented by Prince or by his trustee, duly endorsed, the obligation of the bank would still be that of a depository or trustee or agent to return the special deposit, and not that of a debtor to a creditor, or a banker to its depositor.

We doubt not that if the bank had become insolvent, and there had remained in the bank sufficient cash to cover all margin deposits, the holders would have been entitled to preference over general creditors. There is nothing in the record to indicate that the bank had a right by the consent of the parties to use these funds as its own, or in any other

manner than to hold the same as security for the trades for which they were deposited, but this question does not become important in this case.

In *Moreland v. Brown*, 86 Fed. 257, the Court of Appeals for the Ninth Circuit held that a deposit in a bank, with directions to pay it to a named person, was a special deposit; that the title to the deposit was not in the bank, but in the payee, and that he was entitled to recover it in full from the receiver of the bank. The court also recognized the rule that if the title had not passed to the payee, it would have remained in the depositor, and he could have recovered it.

In *Bolles on Banking*, Section 3, deposits are characterized under two heads: general and special. He defines a general deposit as a loan made to the bank for convenience in business, subject to be demanded at any time in any amount. He subdivides special deposits into two distinct classes: First,

“those kept gratuitously and delivered by request of owner; second, those which are to be applied in a specific manner, like money deposited for discharging an obligation payable at the depository. The second kind of special deposits includes all which are held by the bank as agent, trustee, or any other fiduciary relation; in short, all except those held by the bank as debtor of the depositor.”

Morse on Banking subdivides deposits into three classes. (Section 185 *et seq.*) The first is the *general* deposit; the second is *special* deposit, where the identical money or property is to be returned; and, third, the *specific* deposit, which he defines as follows:

“When money is deposited to pay a specified check drawn or to be drawn, or for any other purpose than mere safe keeping or entry on general account, it is a *specific* deposit, and the title remains in the depositor until the bank pays the person for whom it was intended, or promises to pay it to him.”

The distinction is clearly pointed out in a case almost identical with the case at bar in *Woodhouse v. Crandall*, 197 Ill. 104. Woodhouse leased certain premises to Furlong, who deposited \$1,500 with a bank as security for the payment of rent. The bank executed a receipt reciting that it had received the sum of \$1,500 from Furlong to be held as security for the performance of the covenants of said lease. The money was mingled with the funds of the bank, which afterwards become insolvent. It was held (p. 112) that

“it makes no difference on the question of the identity that the fund was mingled with other moneys of the bank.”

The court further held:

“The transaction in this case was not a mere bailment for the safe keeping of a package of money for Furlong, where the identical thing was to be returned to him as a depositor, and it was not a deposit to the general account of the depositor, Furlong, or Woodhouse. The receipt specifies the terms and conditions of the deposit, and shows that it was not for entry on the general account of either of the parties. In the case of a general deposit with a bank to the credit of the depositor, the relation created is not that of principal and agent or of trustee and *cestui que trust*, but is that of debtor and creditor. Such deposits belong to the bank, and become a part of its general funds, and

there is nothing but a liability as debtor to repay according to the customs and usages of the business. This deposit was for a specific purpose, for the benefit and security of a third person (Charles F. Woodhouse), and it created a trust relation in his favor. The banking firm assumed the position of a trustee, and the money deposited constituted a trust fund, which the bank was bound to keep intact for the purpose of the trust. The obligation of the bank was to preserve the sum of \$1,500 as a trust fund for the person mentioned in the receipt and to apply it to the purposes therein specified, and the title to such trust fund did not pass to the bank as a part of the general funds of the firm. The certificate of deposit was made and attached to the receipt merely for the purpose of identifying and following the fund and showing where it had been put. That was to conform to the plan of keeping books adopted by the bank, and the system of bookkeeping by the trustee could not affect the substantial rights of the beneficiaries."

In *Shopert v. Indiana State Bank*, 83 N. E. 515, where money was deposited in the bank as security for the payment of a shredder machine, to be paid to the seller if the machine was satisfactory and to be repaid to the depositor otherwise, the court held it a special deposit, although the depositor did not understand that he was to get back the identical money deposited. The court said:

"In case of a special deposit, the bank is merely a trustee or bailee, the property right being in the depositor, and the relation of debtor and creditor is not thereby created. But a general deposit vests the property in the bank and establishes the relation of debtor and creditor. Clearly this was not a general deposit; it was a specific sum for a specific purpose, the payee

determinable after the lapse of a specific time and the happening of a specific contingency. After the bank had delivered to the appellant the bill of lading for the machine, the bank could not rightfully deliver the money, either to the appellant or to the shredder company, until the contingency was determined. Under these conditions the bank had no right of profit in it, and could not invest itself with this right by any act of its own without the knowledge and consent of the party or parties who had such interest."

In *Woodhouse v. Crandall* the decision was not based on the theory that the transaction was a special deposit of moneys to be kept and returned *in specie*; but that where the money was deposited for a *particular purpose* the relation of debtor and creditor was not established. It is immaterial whether the identical moneys deposited are mingled with the general moneys of the bank. All that is important is that the identity of the *fund*, as distinguished from the particular pieces of money, should be preserved. On page 111 the court in that case say:

"The material question in this case, therefore, is whether the trust fund deposited by Furlong can be traced and identified; and upon that question the law is well settled that it is not necessary the money or the bank bills should be identified. The suit is not to recover a specific thing, such as particular pieces of money or bills, but a certain sum of money held in trust, and it is the identity of the fund and not the identity of the money or currency which is to be established."

No question arises in this case making the question of the identity of the fund of importance, but notwithstanding, its identity was preserved and

such funds were identified in a particular account, called "Margin Account," separate from the general accounts of the bank. (Trans., 79.)

"A bank has no lien or right of set-off against special deposits or money deposited for a specific purpose, as for collateral security or for the payment of a particular debt."

3 A. & E. Encl. Law, 2d Edition, 822, 837.

5 Cyc. 552.

Morse on Banking, Section 325.

In *Reynes v. Dumont*, 130 U. S. 354, it is held that a bank's lien rests upon the presumption of credit extended in faith of securities in possession and does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien.

A case on the right to set-off under the present bankruptcy law arose in *Wagner v. Citizens' Trust Co.*, 122 S. W. 245. The court, after pointing out that the section of the present bankruptcy law on set-off is almost a literal reproduction of a section from the Act of 1867, quotes *Sawyer v. Hoag*, 17 Wall. 610, as follows:

"This section was not intended to enlarge the doctrine of set-off in cases where the principle of legal or equitable set-off did not previously authorize it."

The court, after announcing the general rule regarding set-off of deposits, says:

“The right of a bank to apply deposits to the extinguishment of a depositor’s indebtedness as it matures, grows out of the doctrine that the relation between the bank and the depositor is that of debtor and creditor, but it is well settled that the bank does not have a lien upon special deposits or moneys deposited for a specific purpose, as for collateral security or for the payment of a particular debt.”

The court comments upon the case of *Bank v. Massey*, as follows:

“But in that case the facts did not show a deposit for a special purpose with the knowledge and consent of the bank, but only a deposit in the ordinary course of business. In such cases the authorities are uniform that the bank has the right to set off its notes against the deposit.”

In *Smith v. Sanborn State Bank*, 126 N. W. 779, the court lays down the rule as to set-off of a deposit as follows:

“Of the general rule that a bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation, there can be no doubt; but it is no less certain that a deposit made for a specific purpose or under a specific agreement cannot rightfully be so appropriated.”

In *Dolph v. Cross*, 133 N. W. 669, a fund was deposited in a bank to meet the payment of certain checks already drawn. The bank was informed of the purpose of the deposit. The bank was garnished by a judgment debtor of the depositor. The court said:

“The facts pleaded show that the execution

defendant made the deposit for the specific purpose of meeting the checks which he had just issued, and this fact was made known to the bank officials at the time of the deposit. The form of bookkeeping was not controlling; that was a mere matter of convenience. The bank officials understood that they received this money for the expressed purpose of paying checks already issued for that exact amount. Whether the facts pleaded show an equitable assignment to the check holder we need not determine. The deposit was specific, not general. It was made for the benefit of the particular check holders. The bank received it as such. It is enough to say that the contract of deposit was for the benefit of the third parties and that such third parties are entitled to avail themselves of it. If the bank itself had been a creditor of the depositor, it could not have applied such deposits upon its own claim. We see no reason for holding the right of the garnishing creditor could rise any higher than that of the bank itself if it were a creditor. * * * The bank, having received the deposit for such specific purpose, was bound by the conditions imposed. (Citing *Smith v. Sanford State Bank*, *supra*.) We reached the conclusion that the deposit in question was special, and not general, and that it did not create the mere relation of debtor and creditor."

In re Davis, 119 Fed. 950, the court say:

"While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when a deposit is made for a special purpose, as, for example, to be paid to creditors, as here. In the latter case a fiduciary relation is created and the money is held as a trust fund, not as bank assets, and hence the bank is without lawful right to apply it to its own use."

In *Western Tie Co. v. Brown*, your Honors held that although there was no question but that the Tie Company was indebted to the bankrupt for the amount collected from its employes, yet there was no right to set-off, because the debt due from the Tie Company to the bankrupt for the deductions was not a "mutual debt or mutual credit." The court say:

"It follows as to such deductions the Tie Company stood towards Harrison in the relation of trustee, and therefore the case was not one of mutual credits and debits within the meaning of the set-off clause of the bankruptcy law."

Counsel for appellant undertake to distinguish this case from *Western Tie Company v. Brown*. We can see no such distinction in principle. In the Tie Company case there was no promise or agreement on the part of the Tie Company that it would pay the amounts collected by it to Harrison, the bankrupt, irrespective of any debt he might owe the Tie Company. The court, however, held that he was under an obligation *from the nature of the transaction* to remit the money. Counsel say that the Tie Company had no right to mingle the funds so collected with its own. Do they infer from this that the Tie Company was a bailee? It will be noted that the Tie Company did not receive any specific currency or money from its employes, but simply paid them their wages, less the amounts the employes owed Harrison, and in due course sent, not any particular currency held as bailee, but their check on their general funds, for the amount due

Harrison. The funds were necessarily mingled among the general assets of the Tie Company.

Counsel state that the bank here did not promise or agree that the amounts represented by the margin certificates should be paid to Prince, regardless of his indebtedness to the bank, and that in the absence of such an agreement the right of set-off existed. Both the premises and the conclusion of this statement are wrong. The very nature of the transaction precluded the idea that when the deposits were received there could be an agreement that they might be applied to Prince's indebtedness. They were held by the bank for a purpose utterly inconsistent with any such right. The rules of the Board of Trade governing margin deposits provide that deposits for security on time contracts may be demanded, *the "securities"* to be deposited either with the treasurer or authorized bank; the certificates issued by the depository as evidence of the deposits were required to state on their face that the deposits had been made under the rules of the Board of Trade. It was the money deposited that formed the security, and not the margin certificate or evidence of the deposit. The agreement not to apply the deposits to Prince's debt was not only implied from the nature of the transaction, but was expressed in the certificate and rules of the Board referred to in the certificate.

Nor is it the absence of an agreement that a demand or obligation should be paid irrespective of a counter-indebtedness that gives the right to set-off; on the contrary, in order that there may exist a case of mutual debts and mutual credits entitling one to

the right of set-off, there must be either an expressed or an implied agreement arising out of the nature of the transaction that such deduction or set-off *shall* be made.

The case of *Scott v. Armstrong*, 146 U. S. 499, 507, is also authority for the proposition that even if the relation of debtor and creditor was established by the transaction between the bank and Prince, yet it was not of the class known as mutual debts or credits. It cannot be said in this case that the bank extended any credit to Prince, founded on and trusting to a debt due by it to Prince on margin securities as means of discharging it.

In *Libby v. Hopkins*, 104 U. S. 307, mutual credits are defined to mean only such as must in their nature terminate in debts. The court says:

“The fact that he gave the direction imposed on plaintiff the obligation to apply the money as directed or return it to him. They had no better right to refuse to make the application and to reclaim the money and set it off against the debt due to them from Hopkins than if they had been directed to pay the money on the debt of him to another of his creditors, or than they had to apply to the payment of his debt to them money which he had left with them as a special deposit.”

Distinguishing a deposit, the court further says:

“The relation of banker and depositor did not arise, consequently there was no debt. When A sends money to B with directions to apply it on a debt from him to B, it cannot be construed as a deposit, even though B may be a banker.”

The court further holds in the *Libby* case that

credits and debits are correlative terms; that what is a debt on one side is a credit on the other; that "credit" does not include "trusts"; that there must be *mutual* credits or debits to authorize set-off; that remitting money to be applied would not make the party receiving it a debtor, but a trustee.

In *Gray v. Rollo*, 18 Wall. 632, in discussing the right of set-off in bankruptcy, the court say:

"Neither transaction was entered into in consequence of or in reliance on the other; and no agreement was ever made that one claim should stand against the other, there being neither mutual credits or mutual debts, the case does not come within the terms of the bankrupt law."

The above case was cited with approval in *Munger v. Albany City Bank*, 85 N. Y. 589. This was a case in which one of the points involved a construction of the section of the bankruptcy law regarding set-off of mutual debts and mutual credits. On this point the facts were that the plaintiff was indebted to a Rochester bank on his promissory notes, and had made a deposit therein, and received therefor a negotiable certificate of deposit payable on demand. The Rochester bank sold the notes to the Albany City Bank and went into bankruptcy before the certificate of deposits had been presented for payment. The court says:

"It is clear that there were not, when the Rochester bank became insolvent and was put into bankruptcy, mutual credits existing between it and plaintiff. There was no connection between the credit for the deposit and the credit for the sum loaned on the discount of the note. * * * There is no finding, no proof, there can be no inference that the discount of

the first note for the plaintiff, and the renewals of it by the Rochester bank, were made in dependence upon or in view of the deposit made by him with the bank, or that he made the deposit in expectation of a discount, or for the purpose of getting it, or as a means of security for the payment of it. There is no connection between the two acts, and no mutual credit for either was entered into in consequence or in reliance upon the other, and no agreement was made that one should stand against the other. Apart from the bankruptcy act, and the interpretation of it by the federal judiciary, it seems that a mutual credit is a knowledge on both sides of an existing debt due to one party and a credit to the other party founded on and trusting to that debt as a means of discharging it."

In *Rawleigh v. Rawleigh*, 35 Ill. 512, the court points out that a right of set-off exists in equity where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or off-set of the other, and that there must at least be sufficient to show that the credit was given under circumstances warranting the conclusion that the parties acted upon the understanding that one demand should be applied in liquidation or set-off of the other.

In the case at bar, the undertaking of the bank to hold the funds as security for trades under the rules of the Board of Trade was inconsistent with and precludes the contention that there was any such implied understanding as to set-off. There was no connection whatever between the loaning of the money by the bank to Prince and the deposit of

the margin securities with the bank as a Board of Trade depository.

Counsel for appellant cite *Amercian Exchange Bank v. Mining Co.*, 165 Ill. 103, to the effect that in case of a deposit of a trust fund, when the trust is fulfilled or fails, the money is due absolutely to the depositor. We agree with this suggestion, but we must add that the money is due from the recipient of it in the same capacity or relation as that in which he received it. If he received it as a trustee or agent, he is bound to repay it as a trustee or agent, and cannot, by any act of his own, without the consent of the other party, change his obligation into that of a debtor. One can easily conceive situations where money is received as trustee or agent in which the refusal of a trustee or agent to pay would not be a mere default of a debtor, but would be a conversion, is not the crime of embezzlement. The case cited certainly does not hold that where a trust fails the ordinary relation of debtor and creditor necessarily exists.

We can see no similarity between the case of *Minard v. Watts*, 186 Fed. 245, and the case at bar. The deposit there was not for security nor for any particular purpose, but simply a deposit on account, the ownership of which was thereafter to be determined. Counsel say on page 26 of their brief that the defendant bank here was doing a banking business and it cannot be presumed it was acting as bailee in respect to the funds in controversy. We suggest that it does not have to be presumed. It is stipulated and proved as a fact that it was acting as a depository in respect to the funds. Whether you

call it by the name of bailee, or trustee, or agent or depository is immaterial. It did not hold the funds as a banker or debtor.

In the case of *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261, a check was deposited with a banker to be returned when the banker's liability as surety on an appeal bond was discharged. It was not a deposit for the benefit or security of a third person, as here. The identity of the fund could not be established and this was considered sufficient to prevent the allowance of the claim as a preferred one over other creditors of the banker, who had become insolvent. So far as may be considered applicable here, this case is overruled in *Woodhouse v. Crandall*, cited above. Equitable principles not here involved controlled the decision.

On principle and under the authorities referred to, it is apparent that a court of equity, in applying the principle that "equality is equity," might hold that a deposit in an insolvent bank for a particular purpose, where the money was mingled with the general funds and incapable of being followed and identified, would create the relation of debtor and creditor, to the extent of making such depositor share equally with other creditors, yet in applying the same principle that "equality is equity" in a case where the bank claimed the right to set off a debt against such special deposit,—there being no insolvency of the bank and consequent rights of its creditors involved, would hold, under the same circumstances, that the debt was not of that class known as "mutual," and that no right of set-off existed. The principle that "equality is equity"

would demand in case the allowance of set-off had the effect of creating a preference, that such deposit should be considered a trust, and incapable of set-off, so that the bank would have to share with other creditors of an insolvent depositor in the proceeds of such trust.

In re Linde Mercantile Co., 156 Fed. 713, *Johnson v. Forsyth*, 115 Fed. 268, the question of the validity of the transfer of an entire business from the proceeds of which payments were made to certain creditors, was under discussion, and the transfers, which were made under circumstances similar to those in the case at bar, were held fraudulent.

We fail to distinguish the case at bar from *Woodhouse v. Crandall*. That was neither a bailment nor a deposit on general account, but a deposit for special purpose *as security* under which the banker became a trustee. In facts and in principle it is almost on all fours with our case. Suppose Furlong, who made the deposit for the security of Woodhouse, had been indebted to the bank, and had become insolvent to the knowledge of the bank, and had been at the same time indebted to Woodhouse so that he, Woodhouse, would have had to look to the deposit for his payment. No right of set-off would here exist as between the bank and Furlong. Suppose the bank had said to Furlong: "Sell your merchandise and pay Woodhouse what you owe him, then we will set off this deposit against what you owe us." Here we have the same question as in the case at bar. It cannot be doubted for a moment that the transaction would have been condemned both as a preference and as obtaining a right of set-off with

knowledge of insolvency, and intention to use it as such, under Section 68. We submit that the mere statement of the proposition demonstrates its correctness. There would have been a transfer of the bankrupt's property, not to the bank, it is true, but for its benefit, and the law is specific that the person *benefited* by a transfer under such circumstances, although the transfer is indirect, is the one who receives the preference.

The right to a set-off, and the obligations of the bank as to the margin deposits, must be determined by the situation as it existed when the bank first learned of the insolvency of Prince, and not by any situation or condition brought about by collusion with the bankrupt, after such knowledge, for the purpose of giving it benefits or advantages which it did not before have. The trust relation of the bank toward the deposits still existed on February 14th, when the transfer was agreed upon. If the trust relation thereafter ceased, and the relation of debtor and creditor arose, it was certainly brought about by the collusion of the parties, and for the purposes of effecting a right to set-off. We cannot ignore the circumstances under which the alleged indebtedness of the bank to Prince was brought about.

We cannot see that the fact that a trustee has failed, or not been required, to carry out the purpose of a trust, can have any bearing upon his relation as a trustee toward the subject-matter of it; for instance—in the case of *Woodhouse v. Crandall*, suppose that Furlong had paid to Woodhouse the rent due him from time to time so that it had not

become necessary for Woodhouse to resort to the trust fund held by the bank; can it be doubted for a moment that Furlong would have the same rights against the fund as Woodhouse had? The relation of debtor and creditor was not established when the deposit was made, and whether the fund was to be reclaimed by Woodhouse or by Furlong could make no difference; it was still a special deposit held by the bank as trustee, and not a debt.

It is useless to argue that would have been the situation if the bank had owed Prince money on its promissory note, or on its certificate of deposit. It is the circumstances under which the indebtedness of the bank to Prince is brought about that are of controlling importance. But if the bank, knowing Prince's insolvency, had said to him: "You cannot pay us \$10,000 on your indebtedness because that would be a preference, but go to John Smith and buy from him a certificate of deposit for \$10,000, which he holds against this bank, and we will use it as a set-off," it would unquestionably have been a preference, or a set-off acquired in violation of Sec. 68 B. This is essentially the situation in the case at bar. So we see it is important, not only to know what the obligation of the bank to Prince was, but how was it brought about and created. If the bank ever sustained the relation of debtor to Prince as to the margin certificates, it was only after the interest of the other parties in the certificates had been satisfied by the transfer of trades brought about by the bank for the very purpose of creating an alleged relation of debtor and creditor between it and Prince.

Suppose we take the other case, suggested by counsel, of a savings account in the name of two persons. Of course, when a deposit account is owing to two persons, a bank cannot set off the account against a debt due it from one of them, the debts not being mutual. But if one of the joint depositors, being a debtor of the bank and insolvent, should be induced by the bank to transfer some of his property to the other joint depositor in consideration of which he released or transferred to the debtor depositor his interest in the deposit, thereby making it payable to the debtor depositor alone, can it be maintained that a set-off would be allowed?

(b) *Relating to \$575.79.*

If a fair interpretation of the stipulation of facts regarding the special deposit arrangement entered into on February 10, 1905, warrants the conclusion that the deposits were made before the specified checks were paid, the position of the bank is not benefited, under the authorities above quoted.

The deposit of sums of money to pay particular checks, and against which it is agreed that other checks shall not be paid, comes within the definition previously given of specific deposits, and for that reason, if for no other, there would be no right of set-off. The refusal of the bank to honor any checks presented against Prince's account, except the checks specified in the special arrangement, takes it out of the category of a general deposit, which is defined in the authorities to be simply a loan to the bank for convenience in business, subject to be demanded in any amount at any time. If there were

other salary checks issued by Prince in amount sufficient to use up the \$575.79, which the bank would have been bound, under its agreement, to pay if presented, then certainly there was no right of set-off, as such a right would be inconsistent with the agreed duty of the bank to pay the specified checks. It is admitted that the bank refused to pay checks that were not salary and other agreed checks between February 10th and 14th. If there were other salary checks outstanding, for payment of which this fund was deposited, then the trustee is entitled to recover.

This arrangement would make the bank a trustee of the funds so deposited for that particular purpose and under the decision in *Western Tie Company v. Brown* there could be no set-off. In *Germania Savings Bank v. Loeb*, 188 Fed. 285, decided by the Sixth Circuit Court of Appeals, the proposition is recognized that the existence of an agreement that the depositor of deposits under such a special agreement, giving the depositor the right to draw out all new deposits, would make the bank a trustee, and deny it the right of set-off.

III.

AS TO THE APPLICATION OF SECTION 68B.

Although the question is not necessarily involved in the decision of this case, yet the right of set-off does not exist, because whatever right exists was acquired in violation of Section 68B of the Bankruptcy Act, which forbids the transferring of a set-off with a view to such use. The case is squarely

within the rule as disclosed in *Western Tie & L. Co. v. Brown*.

Counsel for the appellant contended that this section was intended to apply only where a *debtor* of the bankrupt purchased a claim against the bankrupt for the purposes of set-off. It would be contrary to the spirit of the bankruptcy law, and in effect nullify its aim to secure equal distribution of assets among creditors, if such a narrow construction should be adopted. The word "debtor" is used as designating the party as of the time that the right to set-off is claimed, which is after a party sustains both the relation of debtor and creditor of the bankrupt. The meaning and operation of the section would have been the same if the word "creditor" had been used instead of "debtor." In every case of set-off of mutual debts or mutual credits, each party to the transaction is both debtor and creditor to the other person. What difference does it make, in case of a claim to set-off mutual debts and credits, which was created first, the debt or the credit? The principle that "*Equity is Equality*" underlies the whole bankruptcy law, and it is as applicable where the debt to the bankrupt is transferred to the creditor as in the reverse case. For illustration: A is indebted to B for \$1,000 on a promissory note, and is insolvent to the knowledge of B. B knows he cannot take a transfer of property from A or receive a payment in money without thereby creating a preference. Suppose, however, that with knowledge of the insolvency, and with a view to using the debt as a set-off, B buys from A \$1,000 worth of goods, and a bill therefor is rendered. There would

now exist a case of mutual debts and mutual credits, where the debt to the bankrupt or the credit in favor of the bankrupt on the books of B was transferred to or acquired by B within four months of the bankruptcy, and with a view to a set-off against the debt due from the bankrupt. B became a debtor of the bankrupt and was at the same time a creditor. It is a mere matter of the choice of words whether you say B claimed the right to set-off the \$1,000 debt due from B for goods purchased from A, against the \$1,000 credit due to B; or whether you say they set-off \$1,000 credit against the \$1,000 debt. Now A might not know that B was the holder of a note against him, and so not understand that a set-off was contemplated by B. As in *Western Tie Co. v. Brown*, where the bankrupt was also innocent of any intention to set-off claims, the section of the bankrupt act relating to preference might not be applicable. But is there no remedy under the act for such an inequitable result?

As applied to the concrete case at bar the section should read that a set-off or counter-claim shall not be allowed in favor of the Federal Trust and Savings Bank (whether denominated debtor or creditor is immaterial), which was purchased by or transferred to it within four months, etc., with a view to such use. Of course, it makes no difference whether the set-off or counter-claim is transferred directly from the bankrupt to his debtor or creditor, as the case may be, or whether a debt or credit in favor of a third person is transferred to the debtor or creditor. The result is necessarily the same. *Tie Company v. Brown* flatly applies the section un-

der consideration in the same manner as we seek to apply it here. It was not a case of the debtor of the bankrupt buying up claims against the bankrupt, but a creditor, as here, who became a debtor of the bankrupt, and sought to set off that debt against the credit, or the credit against the debt, which ever way you choose to term it.

The decision in *Western Tie Co. v. Brown*, was based on two reasons both of which are applicable here. It decided that the indebtedness of the Tie Company to the bankrupt was that of a trustee, and it also decided that it had acquired a right to set-off, in violation of Section 68b. We submit that there is just as much reason in saying that the first rule announced by the court is *dictum*, and the second the real basis of decision, as to take the attitude of counsel for appellant. The case involved the construction of both sections of the law in relation to set-off. We do not believe that the Supreme Court has been guilty of a gratuitous discussion of something it did not understand.

The case of *National Security Bank v. Butler*, 129 U. S. 223, presents a similar question arising under the National Banking Act. There, after a bank had become insolvent and decided to liquidate, it deposited in the National Security Bank checks amounting to about \$11,000, and received therefor a certificate of deposit. The National Security Bank was at the time a creditor of the insolvent bank. The effect of the deposit and receipt of the certificate was to make the Security Bank the debtor of the insolvent bank. That is precisely the situation which counsel contended was created by the transfer of the

trades and the surrender of the margin certificates in the case at bar. The receiver of the insolvent bank sued the Security Bank and the Security Bank attempted to set off the amount of its debt on the certificate of deposit. It was held that it could not do so, as the transaction amounted to a preference.

Another case similar in principle is *Yardley v. Philler*, 167 U. S. 344, 359. Here the insolvent bank was indebted to the Clearing House Association in a large sum for loan certificates. The insolvent bank had sent to the Clearing House Association about \$28,000 worth of checks on other banks for the purpose of making its daily clearing. The other banks had sent a larger amount of checks drawn on the insolvent bank to the Clearing House Association for the same purpose. Upon the insolvency of the bank, all the checks the clearing house had against it were returned to the respective banks which presented them. This left a credit on the books of the Clearing House Association in favor of the insolvent bank of \$28,000. The Clearing House Association sought to apply this amount on the debt to it from the insolvent bank by way of set-off. The court held that the clearing house held the said sum as an agent and fiduciary representative of the insolvent bank, and that its appropriation of the sum so held as fiduciary agent upon the debt of the bank to it was obviously a preference. The court further held that regardless of the question of the want of a lien or of all questions of fiduciary relation, and considering the matter solely on the general principles of the law of set-off, it could not be allowed, because the situation in which the

credit on its books to the insolvent bank was brought about was created *after* knowledge of the insolvency had been brought to the Clearing House Association and that the right to set-off must be determined by the state of things existing at the moment of the insolvency and not by conditions thereafter created.

The master found as a fact that "the transfer of the \$575.79 and the \$4,250 to the bank were made with knowledge on the part of the bank that Prince was insolvent, and with a view to use these amounts as set-offs against Prince's indebtedness to the bank." (Trans., 95.) Counsel have specified as error that part of the finding which relates to the \$575.79, but not as to the \$4,250.

In *Bank v. Massey*, the language of the court expressly limits the application of the rule laid down to a deposit of money *upon general account* which creates the relation of debtor and creditor, and excludes specifically deposits that might be made "under special circumstances," and says that "the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits." As a matter of fact in that case checks were actually honored against the deposit after it was made. In the latter part of the opinion it is also said:

"There is nothing in the findings to show fraud or collusion between the bankrupt and bank with a view to create the preferential transfer of the bankrupt's property to the bank and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

But the master in the case at bar found from the stipulated and undisputed facts that "every other conclusion was excluded" except that it was the intention of both Prince and the bank to apply all his available assets to the greatest possible advantage of the bank and to the exclusion of his other creditors. *No complaint is made to this court against this finding.*

We are moved by the pathetic appeal with which counsel conclude their argument, *i. e.*, that the funds we are seeking to recover are the very funds the bank loaned to Prince; that the bank is the loser to the extent of \$30,000, etc. We are moved,—but not to tears. There is not the slightest foundation in the record,—or out of it, so far as we know,—for the assertion that Prince made the margin deposits, or the special deposits after February 10th, out of the moneys he had previously borrowed from the bank. Nor would it make any difference if such had been the case. The money became Prince's absolutely when it was loaned to him. The bank had no more interest in it than any other creditor. A preferential payment does not lose its vice because it was made with the same coin originally loaned.

We are glad to be able to agree with counsel for appellant in one respect, to-wit, "It is merely a question of how much the bank shall lose." The question is not novel. It is involved in most law suits and is especially appropriate in bankruptcy cases. We are saddened, however, at counsel's plaint that "there seems to be no good reason why claims of other creditors shall be preferred to those of the bank," etc. Our lament is that we have been

unable to make counsel comprehend that the object of this law suit is not to prefer the claims of other creditors, but to prevent the bank from retaining the preferential advantage it has gained, to the end that the unpaid employes and other creditors may share *pro rata* with the bank in the distribution of Prince's assets.

In view of the unchallenged finding as to collusion between the bank and Prince, we respectfully submit that this case is so clearly within the exception pointed out in *N. Y. County Bank v. Massey* as to justify the conclusion that counsel familiar with that case could have been influenced by no motive but that of delay in prosecuting this appeal. We therefore feel warranted in asking that damages be awarded upon the amount of the decree.

Respectfully submitted,

WILLIAM J. PRINGLE,
EDWIN TERWILLIGER, JR.,
Counsel for Appellees.

We hereby acknowledge service of copies of the foregoing brief and argument of appellee this day of December, 1912.

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Counsel for Appellant. E

